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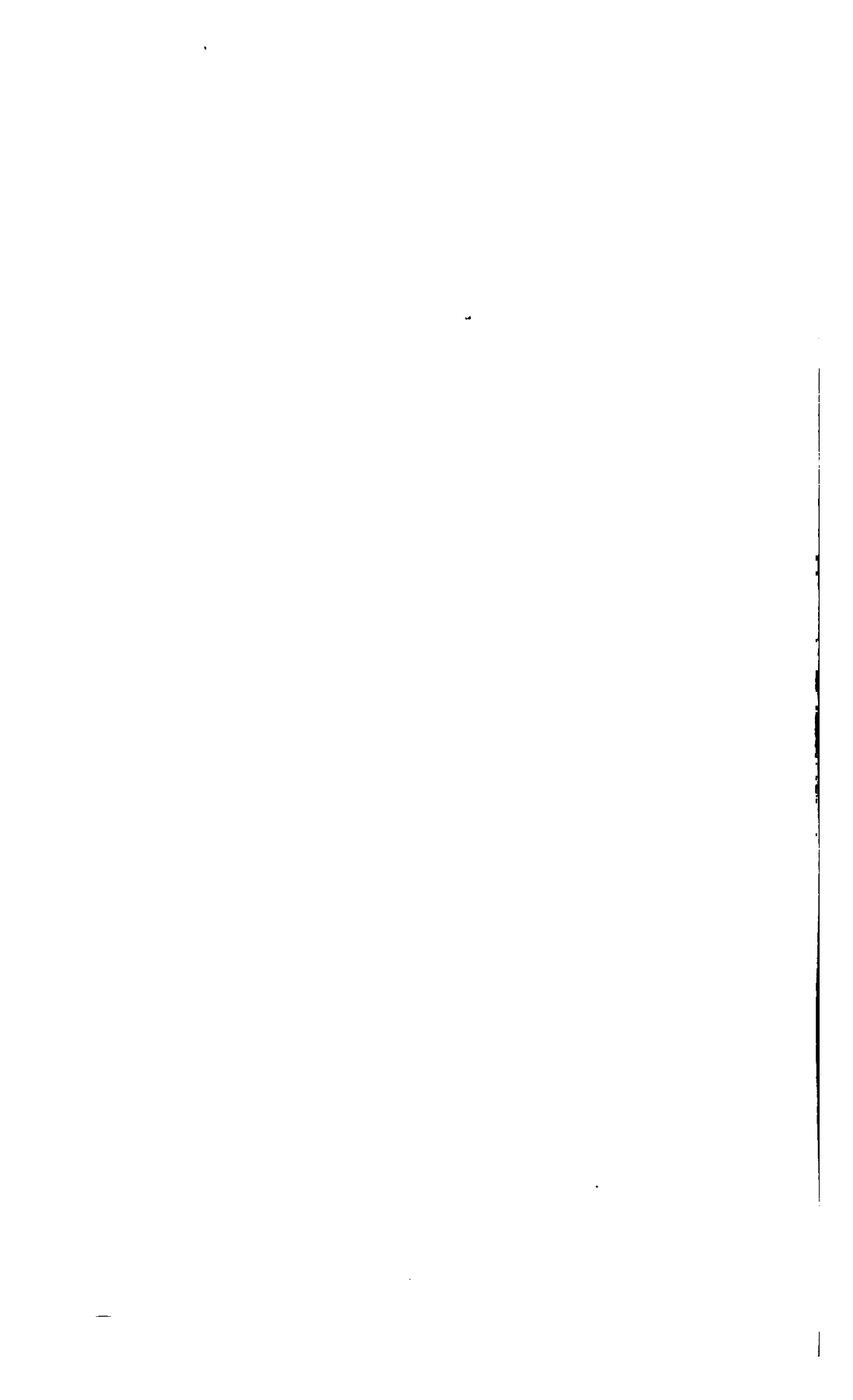
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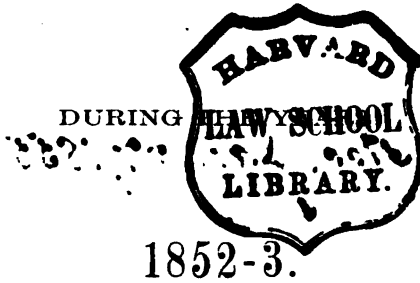
REPORTS

OF THE

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,



BY WILLIAM G. SWAN,
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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS :

HON. R. J. McKINNEY,

“ A. W. O. TOTTEN,

“ R. L. CARUTHERS,*

ATTORNEY GENERAL :

WILLIAM G. SWAN.

*Hon. Nathan Green was a member of the court until the December Term, 1852, when he resigned, and was succeeded by Hon. R. L. Caruthers.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE EASTERN DIVISION.

~~~~~  
**KNOXVILLE: SEPTEMBER TERM, 1852.**  
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STUART vs. CLARK's lessee.

WATERCOURSES. *What constitutes a navigable stream.* The only change in the common law (in its classification of watercourses into streams which are navigable and which are not) effected by the adoption in Tennessee of the rule of the civil law, is the substitution of a new and more appropriate criterion of a navigable river; and that is not the flow and re-flow of the tide, but simply the fact whether the river, in the ordinary state of the water, is capable of and suited to the usual purposes of navigation. In all other respects the principles of the common law, regulating and defining the respective rights of the public and the riparian owners, in rivers of whatever character, remain unchanged.

SAME. Same. A river may be navigable in the ordinary acceptation of the term, and yet not navigable in a legal sense; and such is the river or stream of sufficient depth naturally for valuable *floatage*, such as *rafts*, flat-boats and small vessels of lighter draft than ordinary.

SAME. Rights of the public and riparian proprietors, as affected by the navigability of a water course. If a water course be navigable in a legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. If it be navigable only in the ordinary sense, the ownership of the bed of the stream is in the riparian proprietors, and the public have an easement therein for purposes of transportation and commercial intercourse. If the stream be so shallow as to be unfit for such purposes of transportation and commerce, both the right of property and use are wholly and absolutely in the owners of the adjoining land.

[*Stuart vs. Clark's lessee.*]

This action of ejectment was tried in the Circuit Court for Washington county, LUCKEY, Judge, presiding, when there was judgment for the plaintiff and the defendant appealed in error.

T. A. R. NELSON, for plaintiff in error argued: The Court, in charging the Jury, rejected the common law doctrine as to what constitutes a navigable river—adopted the civil law definitions, and stated: “But if the stream or river is boatable in its natural state, that is, can be used for the carriage of boats, rafts and other property, it is by the decisions of this State, a navigable stream; and the owner of the land bounded by such a stream, can hold the land only to the margin of the river at ordinary low water mark. Streams naturally navigable, may be improved by labor and the expenditure of money, but such labor does not destroy their public character, if it is shown that in their natural state, boats, rafts and other property can be floated on their bosom. To make them public or navigable streams, it is not necessary that they should be capable of being boated at all seasons of the year; but if without labor, they can, by the natural flow of the current, be navigated, it will be sufficient. The rise of the river by rains is its natural state.” On these points, we insist that the court erred.

1. The Court no where tells the jury what is a navigable and non-navigable stream, nor is any definition given in *Elder vs. Burrus*, 6 Hum. 367.

2. That part of the charge which speaks of “little streams not boatable,” is copied from Angel on Watercourses, 4th Ed., p. 556, § 539; but the Court omitted the concluding sentence of that section, which is relied upon to show that, as the Nolachucky is not navi-

[*Stuart vs. Clark's Lessee.*]

gable in its natural state, but is only made so by the labor of the Nolachucky Navigation Company and others, it did not become a public river, but at most only "a public and private river", within the meaning of § 535, belonging to the owners of the soil but subject to the servitude of the public interest. On this point, see 3 Dev. Law Rep. 60, 61; 2 Dev. and Bat. 54, 59; 3 U. S. D. 354, No. 6; Angel on Wat. §§ 542, 545, p. 561; see also Sir Matthew Hale's Treatise, DeJure Maris, chap. 3, quoted in 6 Cowen 539, and see p. 543, 548.

3. In defining what is a navigable river, if it can be said that any definition was given or attempted, the Court says that "the rise of the river by rains is its natural state." The Nolachucky, according to the proof, cannot be descended at any time without such rise. The charge is believed to be contrary to the doctrine contained in Angel §§ 542, 543, and 545.

The conflicting decisions among the courts of the different States, are adverted to in Angel §§ 546, 547, 548, 549, 550, and we insist that the Supreme Court of Tennessee, in rejecting the common law doctrine as to the ebbing and flowing of the tide, only meant that it was applicable to the great rivers of this country, such as the Mississippi, Tennessee, Cumberland, Ohio, &c., which can be used for ascending and descending navigation at an ordinary state of water, and not to those small tributaries whose navigation depends alone upon freshets.

In the case of *Wilson vs. Forbes*, 2 Dev. 33, upon which *Elder vs. Burrus* was founded, it was proved that Jemmy's creek was navigable. But in 3 Dev. 59, 60, 61, the rule as to non-navigable streams prevailed, although it was proved that the Pedee could be navigated with batteaux in a high time.

[*Stuart vs. Clark's leasee.*]

"A navigable river is a public highway by water," Angel § 535. Yet whoever heard of a road that could not be travelled both ways?

ARNOLD, for defendant in error.

McKINNEY, J. delivered the opinion of the Court.

This was an action of ejectment in the Circuit Court of Washington county, brought for the recovery of a small island in the Nolachucky river.

The lessor of the plaintiff claims title under a grant from this State, dated 21st of July, 1842, for twenty acres, covering a portion of the bed of the river, from bank to bank, and expressly calling to include the island in controversy. The plaintiff in error—who was defendant in the action—claims title to said island under a grant from the State of North Carolina, to Cornelius O'Neal, for two hundred acres, dated the 26th of October, 1786. This grant calls to begin at a marked tree, on the bank of Nolachucky river; thence various courses and distances, to a stake on the bank of said river, at a different point, and "then up the different meanders of the said river to the place of beginning."

The decision rests upon the question, whether or not the Nolachucky river is a navigable stream, in the legal sense of that term. If it be such, then it is clear that the boundary of the O'Neal grant would be the margin of the river, and the island in controversy would not be included in said grant, but would pass to the lessor of the plaintiff under his younger grant, which, in terms, embraces it. If it be not a navigable stream, then it is equally clear, that said island is covered by the O'Neal grant, upon the well established principle of construction, that grants of land,

[*Stuart vs. Clark's lessee.*]

bounded on rivers, or upon the margins of the same, or along the same, convey the exclusive right and title of the grantee to the centre or thread of the stream, unless the terms of the grant limit the boundary to the margin of the river,—said island lying adjacent to the bank of the river, covered by the O'Neal grant, and exclusively between said bank and the centre of the stream.

Without stopping to notice the proof in the record, or to comment on the charge of the Court, we will confine ourselves to a brief discussion of the legal principles which, we think, apply to the case.

By the common law, all tide-water rivers are navigable, to the extent of the flow and re-flow of the tide, and the absolute proprietary interest in the same is in the crown; the right of soil of owners of land bounded by such tide-water streams extending only to high water mark. The term "navigable," has in law a technical sense; and as applied to rivers, in England, does not mean such as, in their ordinary state, are navigable in fact, but only to those in which the tide ebbs and flows and so far only as the influence of the tide extends; above the line where the tide ceases to have effect, the rule of property is reversed, and the property in the soil, or bed of the river, is in the riparian proprietors. And such also is the principle of the common law in reference to all streams not navigable in the legal sense.

The rule of the common law, as to what is a navigable river, namely—the flow and re-flow of the tide—was declared by this Court, in *Elder vs. Burrus*, (6 Hum., 388, 366,) to be inapplicable to this State; and such has been the course of decisions in some of

[Stuart vs. Clark's Lessee.]

the other American courts. This criterion, as applied to England, may be appropriate and practical, because perhaps it embraces pretty much the entire extent of all rivers which, in point of fact, are navigable; but it would be most absurd in its application to our large fresh water rivers, which, though not subject to the influence of the tide, are yet fitted by nature, in their ordinary state, for all the common purposes of navigation.

This Court, in *Elder vs. Burrus*, rejected the common law rule, and followed the rule of the civil law, as to what constitutes a navigable river. According to the civil law, "navigable rivers are not merely rivers, in which the tide flows and re-flows, but rivers capable of being navigated; that is, navigable in the common sense of the term. In the words of the Digest, a navigable river is "*statio iturre navigio*;" Angel on Water courses, § 550.

In Pennsylvania, the common law has been held inapplicable to the great inland rivers of that State, and that the owners of the land on their banks do not, therefore, acquire any right to the soil covered by the waters of such rivers, but that the soil and waters remain in the public. 2 Binney's R. 475; 14 Serg. and Rawle 71.

In North Carolina it is settled, that the ebbing and flowing of the tide is not the sole test of a navigable river. That if a river be deep enough for sea vessels to navigate to and from the ocean, it is a navigable stream, and the boundary of the adjacent land is not the thread or middle of the channel. 2 Dev. Rep. 30; 3 Dev. R. 59. In 3 Iredell's Rep. 277, the court said, a navigable stream existed when the waters were suffi-

[*Stuart vs. Clark's Lessee.*]

cient in fact to afford a common passage for people in sea vessels.

The same general doctrine has been held in South Carolina. 1 McCord's Rep. 580.

It is to be remarked, that the only change of the common law, effected by the adoption of the rule of the civil law, with us, is the substitution of a new and more appropriate criterion of a navigable river; and that is, not the flow and re-flow of the tide, but simply the fact, whether the river, in the ordinary state of the water, is capable of, and suited to the usual purposes of navigation. In all other respects, the principles of the common law, regulating and defining the respective rights of the public and of the riparian proprietors in rivers of whatever character, remain unchanged, and are to be applied by our Courts.

But it is to be borne in mind, that, although we have adopted a new test of the navigableness of rivers, different from that of the common law, still, the term "navigable," as applied to streams, is no less a word of technical meaning than at common law; and the distinction between the technical sense of the term, and its common acceptance, is important to be kept in view, in inquiring into the respective rights of the public and the riparian owners, in reference to the property in the soil, as well as in the use of water courses.

We feel the difficulty of the attempt, under the rule of the civil law, to define with exact precision what is a navigable river, in the legal sense of the term. We are aware of no less exceptionable criterion than that to be extracted from some of the cases before referred to, namely, a river capable, in the ordinary state of the water, of navigation, ascending and descending, by sea vessels;

[*Stuart vs. Clark's losses.*]

that is, such vessels as are employed in the ordinary purposes of commerce, whether foreign or inland, and whether steam or sail vessels.

The only view in which it becomes a matter of any great practical importance to distinguish between rivers that are navigable in the technical sense, and those that are not so, is in reference to the rights of the public and the adjacent owners, in respect to the ownership of the bed of the stream; for, so far as regards the use of the stream, for all purposes of navigation, the public have the same right, whether it be navigable, or not navigable.

If the river be a public navigable stream, in the legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. But if it be not navigable in the legal meaning of the term,—as is the case in England as to all streams above the flow of the tide—the ownership of the bed of the stream is in the riparian proprietors, but the public have an *easement* therein, for the purposes of transportation and commercial intercourse. A distinction is taken, by the common law, between streams which, in the common acceptation of the term, are suited to some purposes of navigation, and small, shallow streams which are not so. In respect to the former—which, though not navigable in the sense of the law, are yet of sufficient depth, naturally, for valuable floatage, as for rafts, flat-boats, and perhaps small vessels of lighter draft than ordinary,—while it is settled, that the right of property, in the bed of the stream, is vested in the riparian proprietor, and in that respect it is to be regarded as a private river; still it is equally well settled, that the public have a right to the free and uninterrupted use and enjoyment of such stream, for all the purposes of transportation and navigation to which it is

[*Stuart vs. Clark's lessee.*]

naturally adapted. And this *easement*, or "servitude of public interest," in the phrase of the Roman law, is as absolute and unlimited in the public, in reference to this class of rivers, as to rivers navigable in the technical meaning of the term.

But as to shallow streams, unfit for such purposes of transportation and commerce, both the right of property and use are wholly and absolutely in the owner of the adjoining lands. Angel on Watercourses, §§ 535, 539, and authorities there referred to. 3 Kent's Com. 411, 427.

From the foregoing principles it necessarily follows, that the judgment in the present case is erroneous, and must be reversed for misdirection of the Court in the charge to the Jury.

Having considered this case upon the principles of law involved in it, rather than upon the facts, we do not feel it incumbent upon us to express any opinion as to the character of the Nolachucky river—whether navigable or otherwise. This question, however, upon the principles herein laid down, will be of no difficult solution.

Neither have we deemed it material to notice particularly the Act of 1799, ch. 35, and other subsequent Acts of like import—declaring that the navigation of Nolachucky, and certain other rivers, "shall be and remain free and open;" and affixing a penalty for any obstruction thereof. We suppose that legislation of this character was neither designed to have, nor can be allowed to have any effect, whatever, upon the rights of the riparian proprietors: More especially can it have no effect upon such rights acquired prior to the date of the earliest statute upon the subject. But

[Garland vs. The State.]

these Acts, so far as they provide that the rivers shall remain open and free for purposes of navigation, are merely declaratory of the common law, as has already been shown.

The competency of the Legislature to affect the rights of the riparian owner, without compensation to him, is a point which calls for no discussion in this case.

The general principle asserted in the case of *Elder vs. Burrus*, previously noticed, is fully approved; but the application of that principle to the facts of the particular case—so far as that may be inconsistent with the general principles herein laid down—we are not prepared to sanction.

Judgment reversed.

GARLAND vs. THE STATE.

HOMICIDE. New Trial. Evidence. When the Supreme Court, upon a review of the testimony detailed upon a trial for homicide, the result of which is the conviction of the accused of murder in the second degree, is satisfied that the facts of the case are involved in too much doubt and uncertainty to warrant the conviction, a new trial will be awarded.

At the June term, 1852, of the Circuit Court for Washington county, ALEXANDER, Judge, presiding, Camilla Garland was convicted of murder in the second degree, and judgment rendered accordingly, from which she appealed in error.

T. A. R. NELSON, for plaintiff in error.

ATTORNEY GENERAL, for the State.

[Garland vs. The State.]

McKINNEY, J. delivered the opinion of the Court.

The prisoner was convicted, at the June term, 1852, of the Circuit Court of Washington, of the crime of murder in the second degree, and sentenced to fifteen years imprisonment in the Penitentiary. To reverse this judgment an appeal in error has been prosecuted to this Court.

The general principles of law laid down by the Circuit Judge, in his instructions to the Jury, are not perceived to be erroneous. If the charge be subject to criticism, in any respect, it is solely upon the ground that the legal principles stated, are not applied as fully and particularly as might have been done to the precise state of the facts as presented in the record.

In this view, the only question we think it necessary to consider, is—whether or not the conviction for murder in the second degree is sufficiently supported by the proof.

In respect to the commencement of the rencounter between the prisoner and the deceased, the evidence, as set forth in this record, is by no means satisfactory; a perplexing obscurity and uncertainty rest upon it.

The only witness of the scene was Mrs. Hyder; and, in reviewing the facts of this case, it cannot escape observation, that her relation to the parties, her condition at the time of the rencounter and the position which she occupied, with reference to the parties, all tend to impair the force of her testimony, as will be noticed more particularly hereafter.

But all considerations effecting her credibility aside, for the present. The inquiry is, was the conviction warranted upon her testimony—taking it as undoubtedly

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true—when viewed in connexion with other facts disclosed in the proof? We incline to think not: to say the least, we entertain strong doubts.

Before noticing the material facts stated by Mrs. Hyder in her testimony before the Jury, and important facts proved by others, it may be proper to premise, that it appears from the proof that Scott, the deceased, was a married man, whose wife and family resided within about a mile of the prisoner. For a period of perhaps more than ten years there had existed between the prisoner and Scott a constant criminal intercourse, during which the prisoner gave birth to a daughter by him, now some ——— years of age. A strong mutual attachment seems to have grown up between them, and their treatment of each other was marked by kindness and affectionate regard, except occasionally during the deceased's fits of intoxication.

It appears that, shortly before the day on which the deceased came to his death, the prisoner had received information that he had laid a plan to get rid of her, and had offered Whitesides a horse to take her out of the country. Mrs. Hyder states, that on the day Scott was killed, the prisoner—who was her sister—came to her house and inquired for Scott. Witness replied that he had gone up the road a short time before. Prisoner said she intended to give him a good whipping. Scott returned in about an hour, and when the prisoner saw him returning, she went into an adjoining room, and asked witness to introduce a conversation with Scott, when he came in, about her. Accordingly, witness asked Scott about his having offered Whitesides a horse to take the prisoner out of the country; and he replied that he had offered him a horse to

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do so. After some further conversation, which witness does not detail, Scott went into a back shed, where liquor was kept, drew a glass of whisky, drank part of it, and set the glass on a bureau that stood by the side of the room door into which the prisoner had gone. Witness then went into the room where prisoner was, and Scott followed her to the door and placed his hands on each side of the door, which had no shutter. As soon as the prisoner saw that Scott had discovered her, she advanced towards him with her hands raised, but open, as if to attack him, and exclaimed, "you d—d old son of a bitch." Scott said, "why, Camilla!" and threw up his open hands, as if to fend off the blows, and backed. They then grappled with each other. Witness was standing behind the prisoner when she and Scott first met, and could not see which caught first. While struggling with each other, they got by the side of a table, on the left side of the door opening into the room into which the prisoner had gone, on which was lying a rolling-pin, belonging to witness, made of yellow poplar, some fifteen inches long, but very light. The prisoner caught the rolling-pin and struck Scott several blows with it about the head and neck,—she struck fast, and gave perhaps ten or fifteen blows. Scott had caught up a chair in his hands, and tried to keep off her blows with it. He held it with the back towards prisoner; made no effort to strike her, either with his hands or with the chair, that witness saw; and caught up the chair after prisoner struck him with the rolling-pin. The chair dropped from his hands and he fell. The prisoner is a very stout woman, stouter than Scott, who had been complaining for some time. When the

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deceased fell, the prisoner cried out—"Lord have mercy, I believe I have killed him!" She raised up his head and shook him, and seemed very much distressed: and when she saw that he was dead, she commenced crying and screaming, and wringing her hands. This witness proves that the prisoner, during her struggle with the deceased, received a very severe cut over one of her eyes, and that she was bruised both above and below the eye, and can't say that the lick was not struck by Scott; but did not see him either strike or choke her; and thinks if he had done either, after they came together, she would have seen it. But, in another part of her testimony, she says, "I was behind her, (the prisoner,) and could not see Scott when they were grappling with each other."

On cross-examination, witness admitted, that she had been on ill terms with the prisoner for years; and had not talked with her in twelve months before the day on which Scott was killed. She also stated that Scott came to her house very often to get liquor. She also admitted that, for a dollar promised her by Scott, a few nights before his death, she had consented to meet him at a grocery not far from her house, and sleep with him all night, while her husband was away from home fishing; and that she went to the grocery, but found him asleep and very drunk; and that she took his purse and pocket book and gave them to her husband, when he came home, and told it as a joke; and that her children were with her. She further stated, that she had not drank a drop of liquor on the day Scott was killed.

Isaac Hartsell proves that he was at Hyder's a few minutes after Scott was killed—describes the rolling-

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pin as eight or ten inches long, two or two and a half inches through, and as weighing perhaps less than one pound. He was well acquainted with the above named witness, Mrs. Hyder; that she had been drinking; and, from her breath and conduct, had no doubt but that she felt the effect of liquor at the time he got to the house; but that she was not so much intoxicated as not to know what she was about.

Russel Garland and Rosannah Bean—the former the son, and the latter the mother, of the prisoner—prove that the bone above the prisoner's eye was, and still remains, indented by the blow received. The first named witness also states, that on the next morning after Scott was killed, he saw marks on both sides of the prisoner's neck. The last named witness states, that two weeks after Scott's death, she saw marks upon the prisoner's throat which looked blue. Jonathan Wright proves, that on the day Scott was killed, he saw several scratches on the prisoner's neck.

Other matters disclosed in the evidence we pass by, as unimportant to be noticed in the view which we have taken of the case, and proceed to inquire whether, upon the foregoing facts, the crime of murder in the second degree, or murder at Common Law, is sufficiently established.

The conviction, if supported, must be rested alone upon the testimony of Mrs. Hyder; and, as already remarked, there are circumstances in the case which cannot but tend to weaken the force of her evidence. The previous state of ill-feeling, of long standing, between the witness and the prisoner; the high probability of the truth of the suggestion—dimly shadowed forth in the proof—that the witness, by her acts, had

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succeeded in supplanting the prisoner in the affections of the deceased, and had herself become, or at least endeavored to become, his *paramour*. Her situation at the time—as proved by other testimony, in contradiction of her positive declaration—being in a state of partial intoxication, and her degradation of character and feeling, to which she confesses with such unabashed assurance; are considerations which, taken all together, may well be allowed to diminish confidence in the truth of her testimony.

But even supposing there were nothing in the case to detract from her credibility, to what weight is her testimony entitled, when taken in connexion with other facts proved in the case, by witnesses of equal claims to credit, so far as we can see from the record before us?

True, she says the prisoner advanced, with her open hands raised, as if to attack Scott; and he threw up his open hands, as if to fend off her blows, and backed. They then grappled with each other. But the witness expressly admits that she was standing behind the prisoner, when she and Scott came in contact, and could not see which caught first. She again repeats, that she was standing behind the prisoner, and could not see Scott, when he and the prisoner were grappling together. She says she did not see him either strike or choke the prisoner, and ventures the opinion that, if he had done either, she would have seen it. This, to say the least, would seem to be a rash and inconsiderate statement, not to be reconciled with other assertions made by the witness. If she occupied such a position as that she could not see which caught the other first, and could not see Scott at all while he was grappling with the prisoner, how can she hazard

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even an opinion that, while she was in such a position, and while the parties were thus in conflict, Scott might not have choked the prisoner, or given her a blow, without the witness having seen it? But it is stated by the witnesses, before named, that there were marks on the neck of the prisoner. If this be true, those marks must have been made during the conflict described by Mrs. Hyder; and must have been made by grasping her throat, in a vigorous attempt to choke her. If so, by whom were they made?—and at what stage of the rencounter? If made at all, that they were made by the deceased, can admit of no doubt; and that they were inflicted at the commencement of, or early in the struggle between the parties, is no less certain. The deceased could not have choked the prisoner after he got hold of the chair in his hands; and, according to the proof of Mrs. Hyder, he caught up the chair after the prisoner commenced striking him with the rolling-pin. Upon the hypothesis that the prisoner was choked, the probability is that the deceased seized her by the throat when she first advanced upon him, or soon thereafter; and nothing in the case excludes the possibility that the prisoner may have laid hold of the rolling-pin to aid in relieving herself from his grasp.

Upon the assumption, then, that the prisoner was choked in the struggle—an assumption made probable by the testimony of Garland, Walker and Bean, and not at all contradicted by the testimony of Mrs. Hyder; and that it took place at the time and under the circumstances indicated—we have no hesitation in saying that the homicide would not amount to murder in the second degree. Malice, in the proper sense of

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that term, could not be predicated of such a killing. The fact that the prisoner went in pursuit of Scott to the house of Mrs. Hyder—that she previously declared she would give him a good whipping—and that she advanced upon him, with her open hands raised, when he approached the door of the room where she had concealed herself, to learn from his own lips whether, indeed, he had seriously resolved to cast her off and stealthily force her away from her home and her friends after having dishonored her, made her the mother of a daughter now verging upon womanhood, and sustained the relation of husband, *de facto*, to her for a long series of years:—all these facts will perhaps be entitled to but slight consideration, when proper allowance shall have been made for the utter exasperation, and desperation of feeling which the avowal of such a determination, on the part of the deceased, may well be supposed to have excited in the breast of one even so debased as the prisoner.

The result is, that, in our view, the facts of the case are involved in too much doubt and uncertainty to warrant the conviction; we therefore reverse the judgment and remand the case, to the end that, upon another trial, the facts may be more fully and clearly ascertained.

Lessee of BROCK et als. vs. BURCHETT.

AUTHENTICATION OF DEED. *Act of Congress of 1804, and Statute of Tennessee, of 1811, ch. 76.* In order to make effectual as evidence a Virginia grant for lands, which, according to the provisions of the Act of 1803, ch. 58, will be recognised as a valid muniment of title, the Register of the Land Office of the State of Virginia should certify under his seal of office, (or if there should be no seal he should so state), and the Governor should attest that the certificate is in due form and made by the proper officer.

SAME. *According to the Common Law.* To authenticate the grant according to the Common Law form, the Governor's certificate, under the great seal of the State, should itself verify the copy. The attestation of the official character of the officer whose certificate purports to verify the copy is not sufficient.

GRANT. Evidence. Presumption. A grant may be presumed where a person claiming to be owner has been in possession of the lands for a period of twenty years; but this presumption may be repelled by whatever would rebut the fact of an adverse possession under the statute of limitations.

This action of ejectment was tried in the Circuit Court of Claiborne county, at its May Term, 1852, ANDERSON, R. M., presiding, when there was judgment for the defendant, and the plaintiff appealed in error.

On the trial the plaintiff offered in evidence the grant from the State of Virginia mentioned in the opinion, to which the following certificates were appended:

"A copy from the records of the Virginia Land Office, as witness my hand and seal of office hereto affixed at Richmond, this 27th day of August, one thousand eight hundred and forty-five.

S. H. PARKER,

Reg. Va. L. Office."

"Virginia, to wit:

"I, James McDowell, Governor of the State aforesaid, do hereby certify and make known to all whom it may concern, that S. H. Parker, whose name is subscribed to the certificate subjoined, is, and was at the time of subscribing the same, Register of the Land Office of Virginia, duly appointed and qualified according to law; wherefore, to all his official acts full faith, credit and

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authority are due and ought to be given. In testimony," &c., &c.

The copy so authenticated was rejected by the Court.

PECK and MAYNARD for plaintiff in error.

HEISKELL for defendant in error, argued that the certificate under the Act of 1804, must show that the officer's "attestation is in due form of law, and by the proper officer." Merely to show that he is the proper officer, and that full faith, &c., is due to his official acts is not enough. To show that the grant was not verified according to the common law form he cited 1 Starkie Ev., 7 Ed., 227, n. z.

TOTTEN, J., delivered the opinion of the Court.

This case is an action of ejectment instituted in the Circuit Court of Claiborne, in 1845, for one hundred acres of land. At May Term, 1852, there was judgment for defendant, and plaintiff has appealed in error to this Court.

The title exhibited by the plaintiff at the trial, consists of a copy of a grant from the State of Virginia, for five thousand acres, to Major Dowell, dated February, 8, 1796: second, a deed from said Dowell to Joseph Brock for said five thousand acres, dated July 6, 1808; and third, proof that the lessors are heirs at law of said Joseph Brock.

The five thousand acre grant is located upon the State line, and between the lines known as Walker's and Henderson's line—a part of it being in Virginia and a part in Tennessee. The one hundred acres in question

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was granted by the State of Tennessee to the defendant, the 27th November, 1836:—it is bounded on the North by the State line, and is included in the limits of said five thousand acre grant. The Virginia grant being offered in evidence at the trial, was rejected by the Court, and in this it is said there is error.

We may observe that the true boundary between Virginia and Tennessee, being a line equi-distant between Walker's and Henderson's lines, was marked and agreed upon by the agents of said States in 1802. In 1803, the Legislature of Tennessee recognising the said boundary, declared that all claims and titles derived from Virginia for lands that have fallen into this State under and by reason of said boundary treaty, should be held good and valid, as if derived from North Carolina or Tennessee. Act 1803, ch. 58; *Campbell vs. Crockett*, 8 Yer. R. 225.

The Act of 1811, ch. 76, requires that such grants shall be registered in the county where the land may lie; and that deeds for the same, executed and proved in the State of Virginia, shall be so registered.

It follows, that, if this Virginia grant be well authenticated, there is no question but that it is a valid muniment of title. But we do not think it well authenticated.

It purports to be "a copy from the records of the Virginia Land Office," certified by S. H. Parker, Register. The Governor of Virginia, under the seal of the State, further attests that the person named is Register of said land office, duly appointed, and that his official acts are entitled to full faith and credit. Upon these certificates the copy is registered in the proper county in the State.

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Now, if the Act of Congress, of 1804, be relied upon, the answer is, that the Register does not certify under his seal of office, or, if there be no seal, he omits to state that there is none. And the Governor's certificate is defective in not stating that said "attestation is in due form and by the proper officer;" his certificate being necessary, under the statute, to establish these facts.

Nor is it well proved at the common law, under the seal of the State. The Governor's certificate, to which the great seal is affixed, does not verify the copy or make any allusion to the grant. It simply attests the official character of the Register, leaving the verity of the copy to rest upon his certificate. The grant or the copy is not, therefore, attested under the seal of the State.

Nor are we aware of any Statute of this State under which the present copy can be read as evidence. The Statutes referred to, do not apply. The Act of 1811, ch. 76, providing that grants of this description shall be registered, &c., and then be admitted in evidence, must be understood as requiring that they be duly authenticated before they can legally be admitted to registration. The same remark applies as well to the deeds provided for in the same statute.

Assuming that this evidence of the grant was properly rejected, it is argued in the next place, that a grant will be presumed from the lapse of time, during which the plaintiffs and their ancestor have claimed and possessed the land.

We may observe that it is a well settled rule of property, applicable to corporeal as well as incorporeal hereditaments, that a grant or other legal conveyance may be presumed, where a person claiming to be owner,

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has been in the use and possession for a period of twenty years. *Hanes vs. Peck's lessee*, M. & Y. 228; *Gilchrist vs. McGee*, 9 Yer. R. 457.

This Court has adopted the period of twenty years in conformity to English decisions, and it was adopted there in analogy to the Statute of Limitations, 21 J. 1. ch. 16.

The rule is not founded merely in policy and convenience; but it is a presumption of fact reasonably to be inferred from long and undisturbed possession and enjoyment, that the claimant had a legal and valid title at the commencement, which from lapse of time and accident, he may not be able to adduce. In such case a grant or other proper evidence of title, will be presumed, but this presumption may be repelled by proof of other facts.

Whatever will rebut the fact of an adverse possession under the statute of limitations, should, upon principle, rebut and repel the presumption of a grant or other title, founded upon twenty years possession. It is a good objection, therefore, if it appear that the possession was by the consent and acquiescence of the true owner, or that it was accidental, and not by design and upon claim, or that it has not been continuous and unbroken for the whole time limited. *Schauber vs. Jackson*, 2 Wend. R. 37; *Daniel vs. North*, 11 East R. 372; 1 Cowper, 110.

The rule is usually applied in defence to protect the party who is in the possession and enjoyment of the property. It applies as well, however, in favor of a plaintiff, who sues for a wrongful ouster of his possession, or for other injury to his rights.

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But upon a careful consideration of the facts in the present case, it is perfectly clear, that the possession relied upon by the plaintiffs, was not such as is required by the rule. It was not continuous, and unbroken for a period of twenty years, nor in fact, for seven years, so far as we can see from the proof. On the contrary, it appears that defendant has been in possession of the land in dispute, from the date of his grant in 1836, and perhaps longer.

There being no error in the record, the judgment will be affirmed.

Judgment affirmed.

WEST vs. WALKER.

SLANDER. *Evidence in mitigation of damages.* Upon the trial of an action of slander to which the defendant has pleaded the general issue and justification, such evidence as may be offered in support of the plea of justification, though insufficient to support the plea, may be considered by the Jury in mitigation of damages.

This was an action of slander for words imputing perjury committed by the plaintiff as a witness. To the action the defendant pleaded not guilty, the statute of limitations and justification. On the trial, in support of the plea of justification the defendant read a record of the prosecution on which the plea was predicated. With reference to the plea and the evidence which had been offered to support it, the presiding Judge, LUCKEY,

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charged the Jury thus: "As to the plea of justification it is alleged there is a variance between it and the record. The plea alleges there was an issue joined in the Circuit Court of Greene county, wherein the State was plaintiff and Tempy Anderson defendant. There is a variance between the plea and the record. The plea ought to have described the indictment as jointly against Tempy Anderson and Reuben West, and that on their trial under that indictment they severed. The evidence given in under a defective plea of justification cannot be looked to by the Jury for any purpose, not even to mitigate the damages." There were verdict and judgment for the plaintiff, and the defendant appealed in error.

SNEED & TEMPLE and MILLIGAN, for plaintiff in error, cited 3 Mass. Rep., 552; 1 Nott & McCord, 268; 3 Cow. Rep., 466; 2 Greenleaf's Ev., § 275, and authorities there cited.

T. A. R. NELSON and BARTON, for defendant in error, cited 1 Am. L. C., 190, and notes; 2 Greenleaf's Ev., § 425; 1 Chitty's Pl., 494, marg.

McKINNEY, J., delivered the opinion of the Court.

On the trial the record of the prosecution on which the defendant's plea of justification is founded, was offered in support of said plea and rejected, on the ground of variance between the record and the description thereof in the plea. And in his charge to the Jury, the Court stated that, "The evidence given under a defective plea of justification cannot be looked to by

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the Jury for any purpose, not even to mitigate the damages."

We think the record was properly rejected, for the reason assumed; but the proposition asserted by his honor, the Circuit Judge, in the foregoing extract from his charge, was calculated to mislead the Jury.

The *general issue* was pleaded by the defendant, and issue taken thereon; and although evidence going to establish the truth of the slanderous words charged was inadmissible under that issue, either in bar of the action or in mitigation of the damages, yet it is to be borne in mind that the tendency of recent decisions is to give a much wider latitude in the introduction of evidence *in mitigation of damages* under the general issue, than formerly. Accordingly it was ruled by this Court, in a recent case at Jackson, that upon the question of damages the defendant might show, under the general issue, that *previous to the time of speaking the words* charged in the declaration, it was *generally reported and believed that the words were true*. So it has been held that, for the same purpose, it is competent to the defendant, under the general issue, to show that the charge was occasioned by the misconduct of the plaintiff, either in attempting to commit the crime or in leading the defendant to believe him guilty thereof. 2 Greenleaf's Ev., 424, 275.

It matters not, then, that *such evidence* may have been given under a plea of justification which failed to be supported by the record. If, in fact, it were offered and received, though not available under the plea of justification, it should have been referred to the appropriate issue, and the defendant have been allowed whatever benefit he may have been entitled to from it. We

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do not assume that any such evidence, in fact, was or was not given in the present case; that is a matter in reference to which it is not necessary, perhaps not proper, that we should intimate an opinion.

We place our decision solely upon the ground that the phraseology of the charge was calculated, though in all probability not so intended by his honor, to lead the Jury to the erroneous conclusion that although evidence in mitigation might, in fact, have been received under the plea of justification, yet *that* plea failing of proper support, such evidence could not be made available for the defendant in any aspect of the pleadings; a conclusion which we think erroneous.

Judgment reversed.

TUCKER *et als.* vs. BURNS.

FORCEFUL ENTRY AND DETAINER. *Constitutional Law. Revivor.* The Act of 1850 which authorises the revival of actions of Forceful Entry and Detainer, in the name of the heir or legal representative of the deceased party, is, as to such cases as were pending at the time of its passage, retroactive in its operation and is that far unconstitutional and void.

The facts of this case are fully set forth in the opinion. The judgment from which the plaintiffs appealed in error was rendered at the May Term, 1852, of the Circuit Court for Hawkins county, LUCKEY, Judge, presiding.

ARNOLD, for the plaintiffs in error.

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T. A. R. NELSON, for defendant in error argued:—The second section of the Act of 1850, which applies to suits then pending, is retrospective in its character, and therefore unconstitutional and void; *Wood vs. Orr*, 10 Yerg. 505, 507.

LYON, Special J. delivered the opinion of the Court.

This suit for a forcible and unlawful entry and detainer was commenced in August, 1845, by Thomas Harmon, and after a trial before the Justices of the Peace, was removed into the Circuit Court of Hawkins county by *certiorari*. On the 29th September, 1847, and whilst the cause was still pending in the Circuit Court, the death of Thomas Harmon was suggested, and at the succeeding January Term the death of Harmon was admitted, and a motion was then made to revive the suit in the name of his heirs, and a *scire facias* was directed to be issued to the defendant Burns, to appear and show cause, if he could, why the suit should not be revived in the name of the said heirs. At the January Term, 1848, of the Circuit Court, the defendant demurred to the *scire facias*, showing, among other causes of demurrer, that the suit could not be revived in the name of the heirs of Thomas Harmon. The cause was continued from Term to Term, until May, 1852, when the Circuit Judge sustained the demurrer, and gave judgment for abatement of the suit, from which the plaintiffs have appealed in error to this Court.

In the case of *Havins vs. Beckford*, 9 Hum., 673, decided at Jackson, in April, 1849, it was held by this Court, upon very satisfactory reasoning, that upon

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the death of either plaintiff or defendant in action of forcible or unlawful entry and detainer, there could be no revival of the suit either for or against the heirs or personal representatives of the parties litigant.

It is therefore not controverted that, at the time of the death of Thomas Harmon, this suit could not have been revived either by his personal or real representative. The decision in *Havins vs. Beckford* probably induced the passage of an Act of the Legislature, on 24th January, 1850, authorizing the revival of such suits in the name of the heirs or legal representatives of the decedent. The second section of this Act declares, "That this Act shall apply to all cases now pending, and which have not been abated by the order and judgment of the Court, where such suit may be pending."

This case is clearly embraced in the provision of the Act, and if the second section is not in violation of the Constitution, then the Circuit Judge erred in pronouncing judgment of abatement. But we think that it is. The Act of 1842, ch. 86, under which these proceedings were instituted, not only gives to the plaintiff the possession of the premises for which he sues, if successful, but rent and damage also. The Act of 1850 necessarily bestows upon the persons in whose names such suits are revived, all the rights which are secured to parties under the Act of 1842, ch. 46. The heir or real representative of the plaintiff, if the suit is revived in his name, would therefore be entitled to recover rents and damages, and the personal representative, if revived in his name, possession of the premises; rights to which they were not respectively entitled previous to the passage of the Act of 1850. The Act

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is therefore retroactive in its operation, so far as it is sought to be applied to cases pending at the time of its passage, and is so far null and void.

Judgment is affirmed.

FARNSWORTH vs. DINMORE *et als.*

CONTRACT. *Consideration. Distribution.* Upon the assumption that, prior to the Act 1839, ch. 48, land settled upon a child by an intestate in his lifetime, was not subject to be collated in the division of personal estate among the distributees of the intestate; yet, if the child to whom land has been given prior to the passage of that statute, agree in writing with his co-distributees, (for the purpose in the language of the agreement, of settling the division of the estate equitably and amicably), that each of the distributees shall bring into the account for division any property received by him or her from the intestate during his life, or from his estate after his death, such agreement is supported by a sufficient consideration, and the land so advanced, should, by virtue of the agreement, be collated in the division.

This was a bill filed in the Chancery Court at Greenville, upon the facts so fully set forth in the opinion. At the May Term, 1847, the cause was heard, Chancellor WILLIAMS presiding. There was a decree for the respondents, and the complainants appealed.

PATTERSON and SNEED & TEMPLE, for complainant.

R. M. BARTON, for respondents.

TOTTEN, J., delivered the opinion of the Court.

[Farnsworth vs. Dinsmore *et al.*]

In 1818, Samuel Dinsmore died intestate, leaving his wife Elizabeth and nine children surviving him. The said Elizabeth administered on his estate. The estate consisted of two-hundred acres of land, the homestead: a slave, Fanny, and small personal effects. The Administratrix caused the slave and personal effects to be sold in 1818, and herself became the purchaser of the slave and of a portion of the personal effects. In 1833, an agreement was made for the settlement of the estate, by the Administratrix and her children. It was to the effect that the Administratrix convey to her children the slave, Fanny, and her increase, now four in number, and the personal effects of intestate, yet in her possession, reserving to herself a life-estate therein, and an equal share with the children:—the conveyance to be in satisfaction of eight hundred and one dollars and thirty-six cents, the amount due from her to the children, as distributees of said estate. And it was further agreed that at the termination of the life-estate, said property should be equally divided amongst the said owners thereof—the children of intestate agreeing to account for, and bring into said division, any gifts or advancements of real or personal estate, received by any of them from their father in his lifetime, so as to make an equal division of the entire estate.

In conformity to this agreement, the said Elizabeth Dinsmore, on the 5th February, 1833, conveyed said slaves and other personalty to James Dinsmore and the others, her said children, reserving to herself a life-estate, &c., which conveyance was accepted by the said children. James Dinsmore had received by gift from his father, one hundred acres of land, worth four hundred dollars, and some personal effects. The other chil-

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dren, or some of them, had received some personal effects, but no land. James Dinsmore now refused to give in his land as an advancement; but on the 21st October, 1844, the children of the intestate executed a written agreement for the division of said estate in conformity to the agreement of 1833—the said James Dinsmore being one of the parties to said agreement. At this time, 1844, the said Elizabeth Dinsmore proposes and consents to relinquish her life-estate in said property to her children; and said agreement provides that each of said children shall bring into the account for division, any property received by him or her from said intestate in his life, or from his estate since his death; and in case of disagreement as to its value, the same to be determined by persons to whom the matter shall be referred. The agreement recites that it was intended to settle the whole matter equitably and amicably, and to avoid the expense of litigation. They could not agree upon the value of the one hundred acres of land given by the intestate to James Dinsmore. Thereupon, James Dinsmore selected Henry A. Farnsworth, and the other party selected William —, to report upon the value of said land. They did not agree. We are satisfied that Farnsworth advised James Dinsmore not to go on with the agreement—not to give in the land, and that it would bring him in debt to the estate. James Dinsmore declined to execute his agreement, and on the next day, 22nd October, 1844, conveyed his interest in remainder, in said slaves, to said Farnsworth. Farnsworth stated that he had purchased a law suit, and that if James Dinsmore were not bound to account for said land, he should recover a share in the slaves. The land was valued, by disin-

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interested witnesses at four hundred dollars, and the estate ascertained and divided under said agreement; James Dinsmore not participating in the division. It is proved that the land was of the value of four hundred dollars; and if James Dinsmore was liable under said agreement to account for its value, he had received more than an equal share of said intestate's estate, real and personal, and was not entitled to any further interest therein at the date of his conveyance to said Farnsworth.

The counsel for defendant contends that James Dinsmore was bound, independent of the agreement, to collate and account for the land in the distribution of the personal estate; and he relies upon Acts 1766, ch. 3; 1784, ch. 22; *Pearce vs. Gleaves*, 10 Yer. R. 359. On the contrary, this construction is denied by plaintiff's counsel, and he insists that the rule referred to had no existence until it was declared by Act 1839, ch. 48.

Waiving the discussion of this question in the present case, and assuming that land settled upon a child by the intestate in his life-time, was not, prior to 1839, subject to be collated in the division of the personal estate, we come to the position relied upon by plaintiff's counsel; and that is, that James Dinsmore was not bound by his said agreement, for want of any valid consideration on which it could be founded.

We do not concur in this view of the case. Here was a contested question as to the title of the slaves. It is true, that we consider it void at the election of the children; but the mother assumed to be owner and claimed and held possession of the slaves under color of title. The distributive portions due the children had not been paid, nor the amount due to each ascertained. The nature

[*Farnsworth vs. Dinsmore et al.*]

and value of gifts and advancements to each, was a matter for adjustment; it was insisted that James Dinsmore, the only child to whom land had been given, was bound to collate it in the division of the balance of the estate, real and personal; and this he was not inclined to do. The facts were not disputed; the contest related to the legal rights of the parties upon an admitted and known state of facts.

It is not pretended that the agreement was in any wise influenced by force, fraud or imposition.

Now, if James Dinsmore had full knowledge of the true state of his rights; if he knew that he was not bound to collate the land, and yet agreed, under the circumstances before stated, to collate it, we are not aware of any principle upon which he can avoid the force and effect of his agreement.

If he made it in mistake of law, believing that the land was subject to be collated, even that is no objection to the validity of the agreement. For, it must now be taken as a settled principle, that an ignorance of the law, and a consequent mistake as to the title founded upon such ignorance, is no ground to rescind agreements, or to set aside the solemn acts of the parties. *Trigg vs. Read*, 5 Hum. 535.

But this agreement may well be supported upon the ground that it is the settlement of a family dispute, and contains in itself an amicable adjustment of their conflicting claims and interests. Such agreements are viewed, in a court of equity, with special favor, and are firmly upheld and maintained, in the absence of a well grounded objection. We see no such objection in the present case. 1 Story Eq. Jur., §§ 113, 130, and notes.

[Byrd *et al.* vs. Bank of Tennessee.]

We might say further, that the agreement was founded in mutual promises, imposing a like duty upon each of the parties; that is, that each should collate and account for all that he had received: and that a mutual promise is a good consideration to uphold an agreement even in the strictness of the common law.

But we rest the case mainly upon the principles before stated; and are perfectly satisfied that the parties should be held as fully bound by their said agreement.

This agreement was made before the assignment of James Dinsmore to the plaintiff, who received it with a full knowledge of all the facts and circumstances in the case. The result of the account shows that James Dinsmore had no further interest in the estate at the date of that assignment, and consequently the plaintiff acquired no interest under it.

The decree of the Chancellor will be affirmed.

BYRD *et al.* vs. BANK OF TENNESSEE.

PRACTICE. *Judgment by default.* Whatever may be the length of the term of a court to which a summons is returned, it is error to render judgment by default, for want of a plea to plaintiff's declaration, within the first three days of the term.

The judgment, to reverse which this writ of error was prosecuted, was rendered at the November Term of the

[Byrd *et al.* vs. Bank of Tennessee.]

circuit court for Morgan county; ALEXANDER, Judge, presiding.

MAYNARD and WELCKER, for plaintiffs in error.

No one appeared for the Bank.

McKINNEY, J., delivered the opinion of the court.

This was an action of debt in the circuit court of Morgan, brought by the present defendant in error, against the plaintiffs. The summons was returnable to the November Term, 1851, of said court. The term commenced on the third Monday, being the seventeenth day of the month. The record shows, that, the plaintiff having filed a declaration in proper time, the court proceeded, on Wednesday, the nineteenth day of the month, (being the third day of the term), to render a final judgment by default against the defendants, for failing to appear and make defense to the action; and to reverse the judgment, a writ of error has been prosecuted to this court.

The judgment is clearly erroneous. By the Act of 1794, ch. 1, sec. 26, the plaintiff is required to file his declaration "within the three first days of the term to which the writ is made returnable;" and on failure to do so, the suit may be dismissed at his cost; and the defendant is required to "appear and plead or demur within the first three days after the time allotted for filing the declaration; otherwise the plaintiff may have judgment by default, which in actions of *debt* shall be final," &c.

The judgment, by default, in the present case, is directly in the face of this very explicit and unqualified provision of the statute. Here, the judgment was rendered

[Byrd *et al* vs. Bank of Tennessee.]

within the first three days of the term; before the time allowed the plaintiff for filing his declaration had expired; before the defendants were bound to appear, and before the point of time, when, had they even appeared, they would have been entitled to demand a declaration.

If it were true, as has been assumed, that the practical effect of this provision, if enforced, will not unfrequently occasion inconvenience, perhaps delay, to the plaintiff, in obtaining judgment; as where the term happens to be of shorter duration than the time prescribed for making up the pleadings, still, that argument, however deserving of consideration, when addressed to the department of the government vested with power to remedy the evil, is of no force when addressed to the judicial tribunals, whose duty it is, simply to administer the law as it exists, according to its plain meaning.

This provision of the statute was adopted with reference to an organization of our judicial system, very different from the present: under which the terms of the "Superior Court," as it was called, were usually of several weeks duration; and, therefore, the mischief suggested as likely to occur at times, under our present system, could not have arisen.

But it seems to us, that the inconvenience of an adherence to this rule of practice, according to the terms of the statute, is of much less importance than has been supposed. By the express terms of the Act, the declaration is to be filed "*in the clerk's office*," within the time prescribed; and, of course, the plea, or demurrer, is likewise to be filed *in the clerk's office* within the time limited. The length of the term is unimportant, so far as respects the obligation of the parties to make up their pleadings within the time

[*Hinkle's lessee vs. Shadden.*]

fixed by the statute. The pleadings can as well be made up after the adjournment of the court, as during its session; and it is no excuse for the failure of the defendant to file his plea or demurer, "within the first three days after the time allowed for filing the declaration," that the term had closed before the expiration of that period. True, the plaintiff could not take judgment by default at *that term*, if the defendant failed to comply with the requirement of the statute; but he would be entitled to do so on the first day of the ensuing term. And, thus, any unreasonable delay, or abuse of the statute, may be guarded against.

Judgment reversed.

HINKLE'S *lessee* vs. SHADDEN.

ESCHEATS. *How disposed of.* By the Constitution of Tennessee, Art. XI. § 10, all escheated property of every description whatever is appropriated to common schools, and by the Act of 1835, ch. 23, escheated property shall on demand be delivered to the "Board of Commissioners of Common Schools," "to dispose of in such manner as they may deem best for the common school fund."

SAME. *Sale of land. Parties.* A sale of land made under a decree of Court for the purpose of paying the debts of an intestate, is void, unless the parties upon whom the law casts the estate are before the court. Hence the sale of escheated land so ordered is void unless the "Board of Common School Commissioners" is a party to the proceeding.

This was an action of ejectment tried in the circuit court of Jefferson county, at its December Term, 1851, upon the facts stated in the opinion. There was a

[Hinkle's ~~lessee~~ vs. Shadden.]

judgment for the defendant; LUCKEY, Judge, presiding, and the plaintiff appealed in error.

ARNOLD, for plaintiff in error.

HYNDS, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of ejectment. Verdict and judgment were for the defendant, in the court below, and an appeal in error to this court.

The case turns upon the effect and validity of a sale of the tract of land described in the declaration, made in pursuance of a decree of the circuit court of Jefferson, under which the lessor of the plaintiff derives title to the premises.

It appears from the proof, that the tract of land sought to be recovered, was granted to one Robert Barnhill on the 18th of October, 1824; that said Barnhill died *intestate*, in Jefferson county, in July, 1846, and administration on his estate was granted to John H. Dunkin; that, at the December Term, 1846, of the circuit court of Jefferson, said administrator presented his *ex parte* petition to said court for the sale of said land, for the payment of debts alleged to be due from the estate of the intestate, and for the discharge of which the personal assets were represented to be insufficient. The petition directly alleges, upon its face, that the intestate, Robert Barnhill, "*was a foreigner by birth, and died without leaving any legal heirs known to the petitioner.*"

Upon this *ex parte* petition, the court proceeded to decree a sale of the land, for the satisfaction of the sum of two

[*Hinkle's lessee vs. Shadden.*]

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Judgment reversed.

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[Hinkle's *lessor* vs. Shadden.]

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ARNOLD, for plaintiff in error.

HYNDS, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

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[Hinkle's *lessee* vs. Shadden.]

hundred and seventy-five dollars and eighty cents; that being the amount of the indebtedness of the estate, as reported by the clerk, beyond the personal assets; and on the 24th of May, 1847, the land was sold to the lessor of the plaintiff for three hundred and ten dollars; and in pursuance of said sale, at the December term, 1847, a decree was made confirming the sale, and divesting the title to said land "*out of the heirs and distributees*" of said Barnhill, and vesting the same in the purchaser.

The foregoing is perhaps as much as need be stated, for the decision of the present case, of the altogether irregular and illegal proceedings under color of which said land was sold.

That the sale, upon the facts before stated, was utterly void, admits of no doubt.

Whether Barnhill was an *alien* or naturalized citizen, it is needless to inquire, if indeed any solution of that question were to be found in the record: for, upon either hypothesis, so far as respects the determination of this particular case, the result would be the same.

By a well established principle of the common law, of *feudal* origin and policy, whenever the blood of the person last seized became extinct, and the title of the tenant in fee failed, from want of heirs or other cause, the land *escheated*, or reverted to the original grantor, or lord of the fee, from whom it proceeded. And although feudal tenures do not exist in this country, yet it is a well established principle of American jurisprudence, that when the title to land fails from defect of heirs, "the State steps in the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction."

[*Hinkle's Lessee vs. Shadden.*]

"And whenever the owner dies intestate, without leaving any inheritable blood; or if the relations whom he leaves are aliens, there is a failure of competent heirs, and the lands vest immediately in the State by operation of law: and no *inquest of office* is requisite in such cases." 4 Kent's Com. 424, 425, and authorities cited. 2 Bl. Com. 11, 72, 244.

By the Constitution and law of this State, all *escheated* property, of whatever description, is appropriated to the use of common schools, and the proceeds thereof become part of the "common school fund." See Constitution, Art. XI, § 10; Act of 1835, ch. 23, §§ 1, 6. And to the "Board of Commissioners of Common Schools" is given "the general superintendence of said fund," and by the Act of 1835, above referred to, it is provided that all *escheated* money or property in this State, shall, on demand, be delivered to said Board, or their agent; and the Board is empowered "to dispose of the same in such manner as they may deem best for the interest of the common school fund."

From this brief view of the law applicable to the case under consideration, it will be apparent that, from the face of the petition, the land in question *escheated* to the State, on the death of the intestate without heirs; and that the property being placed under the dominion and control of the Board of Commissioners of Common Schools, who are constituted a body politic and corporate, as Trustees of the fund, said Board was an indispensable party to the proceeding by the administrator, in order to subject said land to sale for the debts of the intestate. That the land vested in the State, charged with all the proper debts and liabilities of the intestate, has not, and cannot be controverted.

[Beard vs. Bricker.]

We need not here repeat what has been so often already declared by this court, that the want of proper parties, that is, the persons upon whom the title of the intestate is cast by descent, or by operation of law, will render a sale of land in a case like the present utterly inoperative and void. The striking absurdity of the converse of this proposition, is sufficiently illustrated by the decree in the case before us, which assumes to divest the legal title to the land in question out of persons not before the court nor parties to the proceeding.

The principles laid down so repeatedly by this court, in reference to this class of cases, we are not disposed to relax; and from which it very clearly follows, upon the ground of want of proper and necessary parties, as well as upon other distinct grounds set forth in the record, but which we do not think it essential to notice, that the sale of the land in the present case was a nullity, and consequently communicated no right or title whatever to the plaintiff. See 10 Humph. 223; *Id.* 610.

Judgment affirmed.

BEARD vs. BRICKER.

ACTION. *Unlawful detainer.* The remedy by an action for unlawful detainer is proper where the party in possession of land has obtained his possession under a verbal contract of purchase, and afterwards repudiates the agreement with his vendor and assumes to hold for himself.

Upon the facts fully stated in the opinion, this action was tried at the November Term, 1851, of the circuit

[Beard vs. Bricker.]

court for Rhea county; KERR, Judge, presiding. There being a judgment for the defendant the plaintiff appealed in error.

TREWHITT, for plaintiff in error.

GAUT, for defendant in error, argued, that a vendee of land by parol, when he ascertains he has been defrauded in the sale, is not estopped from purchasing the land from the real owner and taking the title to himself: *Vance's heirs vs. Johnson*, 10 Humph., 214; *Bowser vs. Bowser*, 10 *Ibid*, 49; *Bowser vs. Bowser*, 8 *Ibid*, 23; 2 Greenleaf Ev., 253. But in a case of actual tenancy in this form of action, the defendant may show that the plaintiff's interest in the land has ceased. (See cases cited above.) In a case where no such relation of tenancy exists, the plaintiff should be forced to his action of ejectment, and the defendant permitted to show that he had no interest in the land at the time of bringing the action, or to set up the legal title purchased in by the defendant to protect his estate.

TOTTEN, J., delivered the opinion of the court.

The action is unlawful detainer, to recover the possession of three hundred and fifty acres of land in the county of Rhea. The verdict and judgment in the circuit court were for defendant, and plaintiff has appealed in error to this court.

The plaintiff purchased the land from John Winfrey, who had been the owner for several years, holding a title bond on Wesley Martin. The bond was delivered to plaintiff without assignment. Under the purchase,

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plaintiff took possession of the land, there being a farm upon it, and by his tenant held the possession for one year. He then, by verbal contract, sold and delivered possession of said land to the defendant, who was to pay therefor two hundred dollars in four annual payments, and plaintiff was to have one half the fruit that might be grown on the place during the said four years. Defendant went into possession under this agreement, about January, 1849. He afterwards denied the plaintiff's right, repudiated the said contract, and purchased a title from one Burdett. The plaintiff thereon notified the defendant to restore the possession back to the plaintiff, and demanded it of him. The defendant refused to deliver the possession, but retained it, and claimed it for himself, under the title procured from Burdett. This suit was thereon instituted in November, 1849, to recover said possession.

His honor, the Circuit Judge, was of opinion that the action could not be maintained, and so, in effect, instructed the Jury.

In this we think there was error. The defendant, as purchaser, entered upon the premises, and held possession under his contract. Holding under his contract as owner, the possession was his own, and was adversary to the right, even of his vendor. He was not to restore the possession, but retain it for himself. If, therefore, it had continued for three years, the present action could not be maintained; if, for seven years, the action of ejectment could not be maintained under the acts of limitation. To this effect we held in a case at Nashville, December, 1851.*

*James vs. Patterson's lessee, 1 Swan, 309.

[Beard vs. Bricker.]

But the agreement being merely verbal, was not obligatory under the statute, and it was in the power of the defendant to repudiate it and to refuse to hold under it. This he did, and the agreement was abandoned by both the parties.

But the defendant's possession, and right of possession, were derived from the agreement, and held under it. Without it he was a mere trespasser, and liable to be turned out for his forcible entry and detainer.

It was the agreement that made his entry lawful and peaceable; but the moment he repudiated it and held against it as he might do, his possession then came wrongful and unlawful; because there was no longer a subsisting agreement to render it a rightful possession.

Now, the Act of 1821, ch. 14, § 3, provides that where the entry has been lawful and peaceable, but the detainer is unlawful and forcible, the action of unlawful detainer will be to recover the possession. Such we conceive is the present case. The principle that governs the case is simply this: an invalid contract under which the parties have been acting, being avoided and repudiated by them, it is just and reasonable that the parties be placed *in statu quo*.

As to the rents and damages, the plaintiff is entitled to such as accrued from and after the time when the defendant's possession became wrongful and unlawful. These he may now recover in the present form of action, as incidental to the recovery of the possession: Act 1842, ch. 86.

The judgment will be reversed, and the cause remanded for another trial.

Judgment reversed.

SIMPSON *vs.* PECK's *Ex'rs.*

EXECUTORS. *Contracts of, with reference to slaves belonging to the estate they represent. Specific performance.* An executor cannot sell slaves belonging to the estate of his testator, unless so directed by the will, or by the decree of some court, empowered, in proper cases, to order a sale; and hence a court of Chancery will not decree the specific performance of a parol agreement of an executor for the sale of slaves belonging to the estate, which is not in pursuance of a written contract made by the testator.

This was a bill filed in the chancery court at Rutledge upon the facts and for the purpose stated in the opinion. The Chancellor, WILLIAMS, decreed for the complainant, and the respondents appealed.

T. W. TURLEY, for complainant.

PECK, for respondents.

McKINNEY, J., delivered the opinion of the court.

On the 4th of March, 1850, the complainant and Benjamin Peck, the defendants' testator, entered into a contract in writing, under seal, the substance of which is, that said Peck, on that day, *hired* to the complainant a slave named Peter, for the period of twelve months, at eight dollars per month. Then follows this stipulation: "If the said Simpson sees proper at the end, or any time during the year, to give the said Peck two hundred dollars, he, the said Peck, binds himself to make to the said Simpson a good and sufficient bill of sale to him, the said Peter, during his natural life; and is not to receive any thing for the hire of said negro man, Peter, for what time he may have worked with him, the said Simpson. But if he, the said Simpson, prefers to pay the hire of said negro man, Peter, he is to pay the said Peck nine-

[Simpson vs. Peck's ex'rs.]

ty-six dollars, payable quarterly, and return unto the said Peck said negro man, Peter, at the end of the year."

It appears that said Benjamin Peck died in October, 1850, and the complainant, in his bill, alleges that after the death of Peck, and within the year, he made known to the executors his election to purchase the slave on the terms set forth in the foregoing contract, as he had also done to the testator in his life-time. The bill further alleges, that at the expiration of the year, namely, on the 4th day of March, 1851, the complainant repeated to said executors his determination to take said slave at the stipulated price, to which they both assented, and agreed to meet complainant at the late residence of the testator, *on the next morning*, when he was to pay the balance of the purchase money; and they were to execute to him a bill of sale for said slave. And that he accordingly attended the next morning at the place designated, tendered the money, and demanded a bill of sale for the slave, but the defendants refused to complete the contract.

The defendants substantially admit the agreement on their part, as set forth in the bill; but assert that, owing to their pressing engagements elsewhere, a precise time in the morning had been mutually agreed upon between them and the complainant, for the meeting and completion of the contract, and that they waited at the place fixed until after the expiration of the time agreed on, but the complainant failed to attend until after one of the defendants had been compelled to leave.

The bill seeks a specific execution of the contract, and the Chancellor so decreed.

In considering this cause, we leave out of view altogether as well the allegations of the answer as the proof, and, taking the case as presented in the bill, we will pro-

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ceed to inquire whether the complainant has made out a case entitling him, as against the defendants, to a specific execution of the contract.

It seems to be conceded, that the complainant was bound to make his election *within the year*, whether to hold the slave under the contract of *hiring*, or to become *purchaser*; and that, excluding the day of the contract, the year ended on the 4th of March, 1851; on which day, by the terms of the written contract between the testator and the complainant, it was incumbent on the latter not only to have made known to the executors his election to purchase the slave, but likewise to have tendered to them the purchase money; and that his neglect to do so, on *that* day, put an end to his right to become purchaser of the slave. But, conceding all this, it is assumed that the verbal agreement of the executors to prolong the time for the payment of the money and the completion of the contract beyond the end of the year, was a valid contract, and had the effect to *save* the right of the complainant to purchase the slave. This assumption, however correct, as respects persons acting in their own right, and dealing in reference to their own property, is, we think, wholly mistaken as respects the defendants acting in the capacity of executors. The failure of the complainant to perfect his right of purchase, within the year, being an absolute determination of such right, the consequence was, that at the instant of time that right was forfeited, the slave became the absolute property of the estate. This being so, the agreement of the executors to extend the time for carrying the contract of purchase into effect, to a period after the expiration of the year, was an agreement which, under our law, they perhaps had no authority to make, and certainly an agreement not proper for

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a court of chancery to decree the specific execution of; because it was, in effect, an agreement for the sale of the slave, not in execution of the written contract made with the testator, but by force of the verbal contract of the executors.

This agreement of the executors, if allowed to have effect, would countervail the policy and provisions of the Act of 1827, ch. 61, §§ 1, 2, which declares all sales of *slaves* void, made by executors or administrators, unless directed by will, or by the decree of some court empowered, in proper cases, to order a sale.

The decree will be reversed and the bill be dismissed, but without costs.

THE STATE vs. BUXTON.

INDICTMENT. *Against a public officer.* While it is true that every culpable neglect of duty, enjoined upon a public officer, either by common law or by statute, is an indictable offence, yet the presentment in such case, unless the act of the officer is clearly illegal, must show with sufficient certainty, that it proceeded from corrupt or culpable motives.

At the July Term, 1852, of the circuit court for Morgan county, the Grand Jury made the following presentment: "That John Buxton, late of said county, Entry Taker, on the first day of September, eighteen hundred and forty-nine, with force and arms, in the county of Morgan aforesaid, and while he, the said John Buxton, was Entry Taker, in and for the said county of

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Morgan, and bound to keep and preserve the books, records and valuable papers of said office, unlawfully did then and there permit and suffer the same to be taken from his office and out of his possession and control, and said books and records were, then and there, greatly damaged, torn and mutilated, to the great damage of divers citizens, and against," &c. The presentment contained another count which charged that the said Buxton, Entry Taker, &c., "not regarding his duties in office, a misdemeanor did commit, in this, that he, the said Buxton, did, then and there, suffer and permit several and divers pages to be torn out of said book, containing many valuable entries, to the great damage," &c. At the March Term, 1852, ALEXANDER, Judge, presiding, the presentment was quashed, and the Attorney General, in behalf of the State, appealed in error.

ATTORNEY GENERAL, for the State.

WELCKER, for Buxton.

McKINNEY, J., delivered the opinion of the court.

It is laid down generally in the books, that a public officer is indictable for misbehavior in his office. It is unimportant whether the office was created by common law, or by statute. Every culpable neglect of duty enjoined on such officer, either by common law, or by statute, is an indictable offence: 1 Russ., on Cr., 135; 1 Salk., 380; Roscoe's cr. Ev., 752.

And where the act is, in itself, clearly illegal, it seems not to be necessary, in order to support an indictment,

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either to allege, or prove, that it was from corrupt motives. *Id.*

The *presentment* in the present case is defective, in failing to show, with sufficient certainty, either that the act was in itself unlawful, or that it proceeded from corrupt or culpable motives.

The judgment of the circuit court quashing the *presentment*, was, therefore, proper, and is affirmed.

OLIVER vs. BANK OF TENNESSEE.

NEGOTIABLE PAPER. *Endorsee's title not necessary to be proved unless put in issue.*

Upon the trial of an action of assumpsit by the endorsee of a bill of exchange against the drawer, the plaintiff is not required to prove the verity of the endorsements, unless there be a special plea, which puts in issue the holder's title to the paper.

DEPOSITION. *Exceptions to. Practice.* Exceptions to the reading of a deposition, unless for intrinsic cause, must be specifically made when the deposition is proposed to be read, or they will not be available in the Supreme Court. *Hodges vs. Nance*, 1 Swan, 57; *Whitley vs. Davis*, *Ibid*, 333.

At the March Term, 1851, of the circuit court for Anderson county, ALEXANDER, Judge, presiding, there was judgment in this action of assumpsit, for the plaintiff, and defendant appealed in error.

LYON and MAYNARD, for plaintiff in error.

CROZIER, for defendant in error.

GREENE, J., delivered the opinion of the court.

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This is a suit by the Bank of Tennessee, against the drawer of a bill of exchange. The declaration sets out the endorsement, showing title to the paper in the plaintiff. The defendant pleaded non-assumpsit.

The cause was tried, and a verdict and judgment rendered for the plaintiff. The defendant appealed in error.

It is insisted by the counsel for the plaintiff in error, that a new trial should have been granted, because, the plaintiff failed to show title in himself, by proof of the endorsements.

By our practice, such proof is not necessary, unless made so by plea. Not a plea upon *oath*, as is required by the Act of 1819, ch. 42, sec. 1, in cases where the party denying the signature, is sued; but a plea denying that the plaintiff had title to the paper. Upon such plea denying the assignment, the plaintiff is put to the proof: not otherwise.

This has long been the practice in this State. In the case of *Richardson & Price vs. Cato*, 9 Humph. 465-6, this court says: "By the law merchant, as it existed in England, for a long period, in a suit against the maker of a note, or the drawer or acceptor of a bill of exchange, by an endorsee, he was required, without any special plea from the defendant, to prove the transfer of the note, or bill; or, in other words, his interest in, or title to sue thereon. But by a practice which seems to have obtained in this State from an early period, without legislative sanction, but too well established to be now questioned, an endorsee in such cases is not required to prove the transfer, or endorsement, of the note or bill, unless put in issue by the plea of

[*Oliver vs. Bank of Tennessee.*]

non-assignment, as it is termed. 1 Ten., R., 149; 9 Yerg. 423.

2. It is said the court erred in admitting the deposition of Jacob Jones to be read; said deposition appearing to have been taken on a day different from the one specified in the notice.

The objection to this deposition was general, not pointing out the special cause wherefore it should not have been admitted to be read.

It is the settled law of this court that it will not reverse the judgment of an inferior court, for admitting a deposition to be read, where the objection is, as to some matter of form, unless the particular defect be pointed out in the objection. When the objection does not point out the defect, it is not to be supposed that the court is to stop the trial and scrutinize the commission, notice, caption and certificate, to ascertain if all is regular. Besides, if the particular defect were pointed out, perhaps it might be obviated, or a non-suit taken, and set aside, and the case properly prepared at the next term.

There is no error in the record, and the judgment will be affirmed.

SLOAN vs. PARKS *et als.*

COSTS. Taxation of, where the judgment is against one, and for others of several joint defendants. Where there are joint defendants, one of whom is acquitted and the others are not, the defendant who is acquitted may recover of the plaintiff such costs only as accrued *separately* and properly on account of his being a defendant in the suit, and the plaintiff is entitled to recover of the other defendants the costs of the suit incurred in the joint defence, or otherwise, except such as may be separated therefrom, as having exclusive reference to the defendant who is discharged. Where the defendants sever the general rule of the Act of 1794, ch. 1, § 74, applies.

This was a motion by the plaintiff to correct the taxation of costs upon the facts stated in the opinion, made in the circuit court of Polk county. At the June Term, 1852, GOODALL, Judge, presiding, the motion was overruled, and the plaintiff appealed in error.

GAUT, for plaintiff in error, cited, 1 Cow. R. 422;
3 *Ibid.* 369.

W. F. KEITH, for defendants in error.

TOTTEN, J., delivered the opinion of the court.

Motion to correct taxation of costs. The action in which the costs accrued was libel. Defendants pleaded jointly, not guilty, and justification. Verdict against Samuel Parks for one hundred dollars, and verdict in favor of the other two defendants. Judgment, that the two defendants who were acquitted, go hence and recover of the plaintiff their costs, and that the plaintiff recover of Samuel Parks the one hundred dollars and costs. Two thirds of the costs were taxed against the plaintiff, in favor of the two defendants who were acquitted; and one third in favor of the plaintiff against Samuel Parks, who was convicted of the libel. The Cir-

[*Sloan vs. Parks et al.*]

cuit Judge refused to correct the taxation, and executions were issued in conformity thereto.

The Act of 1794, ch. 1, § 74, declares, that, "in all actions, the party in whose favor judgment shall be given, or in case of a non-suit, dismissal, or discontinuance, the defendant shall be entitled to full costs," unless otherwise directed by law. Such is the general rule; and where the judgment is for or against all of the defendants, it is of simple application. But on a joint defense, where one is acquitted and the other not, the defendant who is acquitted may recover his costs: that is, such as accrued separately, and properly, on account of his being a defendant in the suit. The writ, judgment, and the like, may be separated from the general costs. So, if the testimony of a witness, or other matter in the case, have exclusive reference to the defendant who is acquitted, the costs thereof may be taxed in his favor, and the plaintiff is liable to pay them.

But the plaintiff is entitled to recover of the other defendant who is convicted, the costs of the suit incurred in the joint defense, or otherwise, except only such as may be separated therefrom, as having exclusive reference to the defendant who was acquitted. The costs that are joint cannot be separated, and the plaintiff is entitled to recover them, if he recover against any of the defendants. See 3 Cow. R., 369; 1 Cow. R. 422, for the New York and English rule under similar statutes.

Where the defendants sever and make separate defense, the general rule of the statute plainly applies. The arbitrary rule adopted in the court below, was erroneous. The judgment therein will be reversed, and the taxation of the costs corrected, as indicated in this opinion.

Judgment reversed.

ELLIS *vs.* ROGERS *et als.*

CLERK OF CIRCUIT COURT. *Motion against, under Act of 1852, ch. 256, § 12.*
Parties. County Trustee. The motion against a Clerk authorized and directed to be made by Act of 1852, ch. 256, § 12, should be made in the name of the County Trustee.

This was a motion against the defendants in the circuit court of Sevier county, upon the facts stated in the opinion. At the July Term, 1852, the court, ANDERSON, Judge, presiding, overruled the motion and rendered judgment for the defendants, from which the Attorney General, CASWELL, appealed in error.

ATTORNEY GENERAL, for the plaintiff in error.

ROGERS & BOYD, for defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was a *motion* in the circuit court of Sevier against the defendant, Rogers, former clerk of the circuit court of said county, and the sureties to his official bond, founded upon an Act passed at the last session of the General Assembly, (ch. 256, § 12,) which provides, "That it shall be the duty of the different Attorneys General in this State to examine the offices of the clerks of the circuit courts in this State, and if, on such examination, it shall appear that the said clerks have received or charged costs for enrolling any cause or causes in said courts, or either of them, and have not recorded the causes within eight months after final trial of the causes for which said costs have been charged and received, then it shall be the duty of the Attorney General to enter a motion against such delin-

[*Ellis vs. Rogers et als.*]

quent clerk and his sureties for the amount of the said costs so charged or received; and the Attorney General shall receive a tax fee of five dollars in each case where the said defendant or defendants are found to be in default."

In the aspect in which this case is presented, it is needless to allude to the facts set forth in the bill of exceptions, further than to remark that, in our view, they make out a case both within the letter and spirit of the Act for a proper proceeding under the statute; but we think the present motion must fail, because not instituted in the form contemplated by the Legislature.

The Act, it will be observed, is silent as to whose name the motion shall be made in; and likewise as to the disposition to be made of the money recovered from the delinquent clerk and his sureties.

The present motion is in the name of Ellis; against whom, at the December Term, 1847, of the circuit court of Sevier, a judgment was rendered in favor of one McNeely for nine dollars and fifty-two cents and costs of suit; which costs, including the fee of one dollar and sixty-two and a half cents for enrolling the cause, were "charged and received" by the defendant, Rogers, as clerk of said court, although the service never was performed.

We are very clear that the motion was improperly made in the name of Ellis. He has no interest whatever in the matter, has no claim to the money to be recovered, and is not a proper party to the proceeding.

This enactment, we think, may be regarded as supplementary to the Act of 1846, ch. 32; and, as dictated by the same general spirit and policy, and should be

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construed *in pari materia* with it. The latter Act provides, that all money due to witnesses, officers and others, which has been collected by *clerks*, either from unsuccessful suits in court or from the State or county Treasury, and which has been in the hands of said Clerks for more than two years, *shall be paid into the county Treasury* as other county monies. And the fifth section authorizes and directs the District Attorney General to take judgment by motion in the circuit court *in the name of the county Trustee*, on failure to comply with the provisions of the Act.

In this view the palpable omissions in the Act of 1852 are so far supplied as that some effect may be given to the law.

But the sixth section of the Act of 1846, which entitles the proper claimant to receive the amount due him from the county Trustee, cannot be applied to the Act under consideration. The fee for enrolling the cause is properly charged to and collected from the unsuccessful party, by authority of law, as part of the legitimate costs of the cause. The neglect of the clerk to perform the duty enjoined by statute, for which the fee is given, does not entitle the party to have it refunded. This is a matter between the public and the delinquent officer.

The argument that the twelfth section of the Act of 1852, above quoted, refers to the preceding section, and applies only to the class of cases directed by that section not to be thereafter enrolled, would make the twelfth section a gross absurdity and leave nothing for it to operate upon; because, by the eleventh section, the class of cases distinctly specified, namely, *misde-meanors*, are not to be enrolled at all after the passage

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of that Act; and, of course, no fee is either to be charged or received for a service not permitted by law. If this had been the object in view, no new remedy was necessary, as the violation of the Act would have plainly fallen within the well defined common law offence of *extortion*.

The twelfth section contains a substantive, independent and most salutary provision; that is, to enforce clerks who have charged or received fees for enrolling causes, required by law to be enrolled, to perform the duty enjoined or be subject to refund the fees wrongfully retained, with costs.

The abstract objection to the *retrospective* operation of this Act, presents no difficulty in the present case. Such an objection is entitled to no great favor, coming from a public officer who has received, by coercion of legal process, and wrongfully retains monies in his hands as compensation for services never in fact rendered.

What limitations upon the retrospective operation of the Act should be applied, if any, in carrying out the intention of the Legislature, we leave to be determined when a proper case shall be presented, and so of other questions which have been suggested.

The motion is dismissed, on the ground that it was not made in the name of the proper party.

MARSHALL vs. KERNS.

ELECTIONS. *When to be held in each Civil District, and effect of omission as to any one of the Districts.* The failure of the Sheriff (or Coroner, as the case may be,) to open and hold an election in each one of the Civil Districts of a County, will vitiate the election of a Circuit Court Clerk.

SAME. *Evidence. Certificate of the officer who holds the election.* The certificate of the Coroner who holds an election is *prima facie* evidence of the election, yet it is competent to falsify the certificate by the testimony of witnesses.

SAME. *Contest. Parties.* The incumbent of an office, or any citizen of the county interested as a citizen in the appointment, may be permitted to offer legal opposition to the investment with a county office of one who claims it under a void election.

The facts of this case are very fully stated in the opinion. At the May Term, 1852, of the circuit court for Campbell county, ANDERSON, R. M., Judge, presiding, this judgment was rendered: "It is considered by the court that the plaintiff is not entitled to be inducted into said office, and is not entitled to be qualified as clerk of this court, and that said election has been successfully contested by the defendant." And, therefore, the defendant, who was in office, was permitted to renew his official bonds, &c. From this judgment the plaintiff appealed in error.

HEISKELL, for plaintiff in error.

SNEED & TEMPLE, for defendant in error, argued:—"The Constitution requires the counties to be laid off into civil districts. Art. vi., § 15. The Legislature carried out this constitutional provision. Act of 1835, ch. 1, §§ 1, 2 and 4; C. & N., 254-5. The election to be valid must be held at the places so appointed. (Act of 1835, ch. 2, §§ 1 and 4,) and the Sheriff or person authorized must certify that these Acts have been complied with—that "*such election*" has been held.

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Act of 1835, ch. 2, § 5; C. & N., 276. If the Sheriff or his officers may omit to open and hold election at *one*, he may omit *all but one*, and thus he may elect whom he *chooses* to all offices."

TOTTEN, J., delivered the opinion of the court.

At the May Term, 1852, of the circuit court of Campbell, James M. Marshall produced a formal certificate of his election as clerk of said court, and also proper official bonds with sureties, and moved the court to induct him into said office. Whereon George W. Kerns, the incumbent in said office, and late a candidate for re-appointment in the election by the people, moved the court for leave to defend and resist the said motion, and it was granted to him.

The certificate of the Coroner acting as Sheriff, states, "that at an election held at the several district election grounds in my county, on the sixth day of March, 1852, according to law, James M. Marshall was duly elected to the office of circuit court clerk." And he states the vote:—James M. Marshall 199, and George M. Kerns 196; there being a majority of three votes for Marshall.

It was proved by witnesses that the election was not held in the fourth civil district of said county. The officer appointed to hold it failed and neglected to attend at the place of voting. There were some fifty or sixty voters resident in that district, and some twenty of them attended on the day at the place of voting. The coroner had notice before his return, that the election was not held in this district. It was a case of wilful omission on the part of the deputy appointed to

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hold it, but we are not prepared to say that the neglect was for any fraudulent design to favor either of the candidates. The proposed new county of Union was to include this district, and it was apprehended by the officer, that if the election were held in the district it might prejudice the efforts that were then being made to establish the new county by a vote of the people. The proposed new county has never had a legal existence.

His honor, the Judge, held the election as void, and refused to induct the plaintiff into said office. Whereon the plaintiff has appealed to this Court.

We may premise, that each county in the State is laid off into "districts of convenient size." (Con., Art. vi., § 15,) in which places are designated for holding all popular elections; 1835, ch. 1, § 4. These districts, into which the whole State is divided, are justly considered a very important feature in our system and policy. The people being thus divided into small communities, and having in each an organization of their own, are the better able to carry out their policy of self-government, as regards both its smallest and greatest interests. The civil district system is of special value in a popular point of view, as it enables every citizen, freely and conveniently, to exercise his elective franchise, as it were at home in his own little community. In view of this policy, it is made the imperative duty of the Sheriff "to open and hold all popular elections at the places designated" in each civil district. 1835, ch. 2.

Now the present election was not held in one of the civil districts. This was an injury to the people of that district, who were thus defrauded of their lawful right to vote in the election of their clerk. Nor can

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it be said that the election was legally held, as the law required it to be held in every civil district.

The people of an important division of the county being thus deprived of their privilege of voting, the officer's return is no reliable evidence that the person returned as elected was the choice of the people in the county. If the election had been held in this omitted district, the result might have been different. To hold the election valid, would be of dangerous tendency; for, if one district may be omitted, more than one may be omitted, and the election be placed very much in the power of the officer.

We do not think the motive of the officer material to the question. The injury to the public is the same, whether the omitted duty be the result of corrupt motives or of mere negligence. In either case the public has been deprived of an important and highly valued right.

We rest the case simply upon the ground that the election was not legally held, because not held in all the civil districts of the county. The people of the county are the appointing power; and the power not being legally exercised, not fully exercised, the plaintiff is not, in fact, or in legal effect, appointed to the office.

The Sheriff's return is *prima facie* evidence of the election. But certainly it was competent to falsify it, by the truth of witnesses, as was done in the present case.

We see no reason why the present incumbent, or other citizen of the county interested as a citizen in the appointment, might not be permitted to offer legal opposition to a false and void election. And such fact

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appearing to the Judge, he should deem it his duty to refuse to qualify and induct the pretender to the office.

Affirm the judgment.

BEDFORD vs. THE STATE.

PROSECUTOR. *Selling spirituous liquors to slaves. Arrest of judgment.* The Act of 1843, ch. 141, § 3, expressly declares that no prosecutor shall be necessary upon any indictment against a party charged with a violation of the first and second sections of the act; and if it appear from the record that the indictment was returned into court a true bill, though there be nothing to show that the indictment was sent by the Attorney General *ex officio*, the court will, after verdict, presume the indictment was submitted to the Grand Jury in the mode contemplated by the statute.

Bedford was indicted in the circuit court of McMinn county, for retailing liquors to a slave. The indictment was signed by George W. Bridges, the Attorney General, in his official character. Upon the back of the indictment, the only endorsement was "Indictment. The State vs. Seth Bedford. A True Bill, William H. Ballew, foreman of the Grand Jury." From the record it appeared that the indictment had been returned into court endorsed as above stated. At the August Term, 1852, of the court, GOODALL, Judge, presiding, there was a trial and verdict of conviction, whereupon the defendant moved in arrest of judgment. The motion was overruled, judgment pronounced in conformity to the verdict, and Bedford appealed in error.

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TREWHITT, for Bedford.

ATTORNEY GENERAL, for the State.

McKINNEY, J., delivered the opinion of the court.

The plaintiff in error was convicted in the circuit court of McMinn county of the offence of *selling spirituous liquor to a slave*, under the act of 1843, ch. 141.

Reasons in arrest of judgment were filed, and being overruled, an appeal in error has been prosecuted to this court.

The principal reason relied upon is, that there is no prosecutor marked upon the indictment; nor is there any endorsement thereon showing that it was sent by the Attorney General *ex officio*.

This is no sufficient reason for arresting the judgment. 1st. The third section of the Act upon which this indictment is founded, in express terms declares "that no prosecutor shall be necessary on any indictment under the first and second sections of this Act."

2d. No exception can be taken, at least after verdict, to the omission of the record to show that the indictment was sent by the Attorney General *ex officio*. The record shows that it was found a true bill, in proper form, and returned into court by the grand jury. It could have been sent no otherwise than *ex officio*, by the Attorney General, whose official signature it bears. And in favor of the proceedings of a court of general jurisdiction, it is a reasonable presumption, that the indictment was sent to the Grand Jury in the mode contemplated by the statute; and more especially should this presumption prevail over

[Keith & Forrest *adm'rs. vs. Metcalf ex'r., &c.*]

the objection, taken in the form and stage of the proceedings presented in this record.

Judgment affirmed.

KEITH and FORREST, *adm'rs. vs. METCALF ex'r., &c.*

REVIVOR. Practice. When ten years have elapsed after the rendition of a judgment—the parties thereto having died in the mean time—in order to revive the judgment, the proper practice is, that the party representing the deceased plaintiff should make suggestion (supported by proof) of the death of the original parties, and move the Court that *scire facias* issue to revive the judgment in the name of the original parties.

SAME. Same. Scire facias. If a *scire facias* which issues to revive a judgment in the name of the representatives of deceased parties, contains no recital that there was an order of Court directing its issuance, it is defective, and a demurrer thereto will be sustained.

This was a proceeding upon a *scire facias* issued in the manner and for the purpose stated in the opinion. At the August Term, 1852, of the circuit court for McMinn county, GOODALL, Judge, presiding, there was judgment for the plaintiff, and the defendants appealed in error.

W. F. KEITH, for plaintiffs in error argued: The *scire facias* does not show that it was issued by the direction of the court, nor does it show the authority on which it was issued. After the lapse of seven years a *scire facias* cannot issue, except upon a motion at bar; and after the lapse of ten years it can be done only on affidavit. Comyn's Dig. 515, 516; yet in this case the clerk issu-

[Keith & Forrest adm'rs. vs. Metcalf ex'r. &c.]

ed a scire facias after the lapse of nearly eleven years, without the death of either the plaintiff or defendant having been suggested of record, and without any direction whatever from the court that it shall issue. The record of the judgment must be in court, for it is the warrant and foundation of the scire facias; and if the record has been lost or destroyed, no scire facias can be awarded, but the party must seek another remedy. Comyn's Dig. 516. See also *Lansing vs. Lyons*, 9 Johns. Rep. 84; *Bank of N. Y. vs. Eden*, 17 Johns. Rep. 105.

VAN DYKE, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

This case is a *scire facias*, issued the 24th of August, 1850, to revive and have execution of a judgment rendered in the circuit court of McMinn, at December Term, 1839, for one hundred and forty dollars and fifty cents, in favor of Smith against Netherland. It issues in the name of Charles Metcalf, as executor of said Smith, against Keith and Forrest as administrators of said Netherland.

The case is involved in a maze of pleading not material to be noticed, as we consider the *scire facias* defective, and the demurrer to the third plea goes back to the first error.

Where no execution has been issued on a judgment within a year after its rendition, the presumption is, that it is satisfied, and a *scire facias* is necessary to revive it before an execution can regularly issue. *Hess vs. Sims*, 1 Yer. R. 143; *Cabiness vs. Garrett*, 1 Yer. R. 491.

And after a period of ten years from the rendition of

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the judgment, the presumption that it has been released or satisfied becomes so fortified by lapse of time, that the *scire facias* can only issue by order of the Court, made on motion and supported by affidavit that the judgment remains in force and unsatisfied. The presumption being thus repelled, the *scire facias* is ordered as a matter of right.

But, after the lapse of twenty years, the defendant must have notice of the motion and affidavit; and thereon the court may exercise its discretion, and allow or refuse the motion as may seem proper in the case. Such is the practice at the common law, and we are not aware that it has been changed by any statute; nor should it be, for it seems very reasonable and proper in itself. 6 Com. Dig. Pleader, 522; *Hardisty vs. Burney*, 2 Salk. 598; 2 Tidd Pr. 1007; *Lansing vs. Lyons*, 9 Johns. R. 84; *Bank of N. Y. vs. Eden*, 17 Johns R. 106..

Now, in the present case, the *scire facias* was issued more than ten years after the rendition of the judgment; and it does not appear in its recitals that any order of court was made allowing it to be issued. For this, it is bad upon demurrer. The proper practice in the present case was, for the plaintiff below to appear in court and make suggestion, supported by proof, of the death of the original parties, that the present parties are their personal representatives, and thereon to move the court that *scire facias* issue to revive the judgment and have execution thereof.

The judgment of the circuit court will be reversed, and judgment here entered for the plaintiffs in error.

Judgment reversed.

FERRELL vs. ALDER, Adm'r.

NEW TRIAL. *Number that may be granted—Act of 1801, ch. 6, § 59.* No more than two new trials can be granted when the trials have been had upon *the facts and merits of the case*. If more than this number have been granted, and the record is silent as to the reason therefor, the court will presume that the last was granted upon the merits and not for any special cause, excepted by judicial construction from the inhibition of the Act of 1801, ch. 6, § 59.

BILL OF EXCEPTIONS. *When to be taken and signed. Practice.* A bill of exceptions relates to matter excepted to at the trial and ascertained before the verdict. It is not requisite that it be formally signed before the trial is at an end; it is sufficient if the exception be taken at the trial and noted by the Court, and it may, during the term, be reduced to writing and signed by the Judge, or the Judge may, in a special case, make an express order, allowing a further time to prepare it.

The judgment in this case was rendered in the manner stated in the opinion at the May Term, 1851, of the circuit court for Claiborne county, ANDERSON, R. M., Judge, presiding. The plaintiff appealed in error.

SNEED & TEMPLE and HEISKELL, for plaintiff in error, cited 1 Humph. 16; Meigs' Dig. 1367.

PECK and MAYNARD for defendant in error.

TOTTEN, J., delivered the opinion of the court.

The action is covenant on a warranty of title to land. The defendant pleaded covenants performed and a special plea alleging champerty in the contract. At the first trial there was verdict for the plaintiff, and a new trial was granted. At the second trial, January 9, 1841, a verdict and judgment were rendered for the plaintiff; the defendant thereon appealed to this court, where the judgment was reversed and the cause remanded for another trial. A third trial was had: verdict for the plaintiff and new trial granted.

[*Ferrell vs. Alder, Adm'r.*]

At January Term, 1851, a fourth trial was had: verdict for the plaintiff for seven hundred and eight dollars and nineteen cents, and a new trial granted. And at May Term, 1851, on a fifth trial, there was a verdict for the defendant. The plaintiff thereon moved the court, to render judgment *nunc pro tunc*, in his favor, on the verdict found at January Term, 1851; which the court refused, and rendered judgment for defendant, whereon the plaintiff appealed in error to this court.

1. We think the court erred in refusing to render judgment on the fourth verdict in the case. The second verdict was set aside for errors of law committed by the court; but as to the first, third and fourth verdicts no such error or other irregularity appears of record.

By the Act 1801, ch. 6, § 59, not more than two new trials shall be granted to a party in the same cause. That is, where the trial has been upon the facts and merits of the case. But the Act does not apply to motions for new trial, founded upon errors of law committed by the court, or misconduct on the part of the jury, or the like cause. These are to be considered as exceptions to the general rule declared by the statute. And if the record be silent as to the cause for which the new trial was granted, we are to presume that it was granted upon the merits, and not for any special cause, excepted by judicial construction, from the inhibition of the statute. *Trott vs. West*, Meigs' R. 166, *Turner vs. Ross*, 1 Humph. R. 16. The proper practice, under this restrictive statute, is to state in the order the cause for which the new trial is granted.

2. A bill of exceptions taken at the final trial is relied upon by defendant's counsel, to show that the new trials were granted, not upon the merits, but for misdirection

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on the part of the judge. It states, imperfectly, the impressions of the judge as to what occurred at the former trials.

We cannot regard it as a valid bill of exceptions or as forming any part of the record in the case.

A bill of exceptions is for matter excepted to at the trial and ascertained before the verdict. It is not requisite that it be formally signed before the trial is at an end. It is sufficient if the exception be taken at the trial and noted by the court; and it may, during the term, be reduced to form and signed by the judge. *Walton vs. U. States*, 9 Wheaton, 657.

In *ex parte*, Martha Bradstreet, 4 Peters' R. 106, the court say it would be dangerous to allow a bill of exceptions of matters dependent on memory, at a distant period, when the Judge may not accurately recollect them, and he ought not to allow it. If the party intends to take a bill of exceptions he should give notice to the judge at the trial; and if he does not file it at the trial, he should move the judge to assign a reasonable time within which he may file it. But we think that the time should be limited to the term when the trial is had; unless the judge shall deem it proper, in a special case, to make an express order in the term, allowing a further time to prepare it.

The judgment of the circuit court will be reversed, and judgment rendered for the plaintiff, as before indicated.

Judgment reversed.

MOYERS for Smith's use vs. INMAN.

EVIDENCE. *Declarations of a nominal party made after he has parted with his interest in the subject matter of the suit.* The declarations or admissions of a party, though nominal plaintiff in the suit, made *after* he has parted with his interest in the matter and another party has acquired the exclusive right in the same subject matter, cannot be admitted in evidence to disparage the right or title of the latter, however it may affect the party himself making such declarations or admissions.

This suit was tried at the March Term, 1852, of the circuit court for Cocke county, ANDERSON, Judge, presiding, when there was judgment for the defendant, and a new trial being refused, the plaintiff appealed in error.

CASWELL & SWANN, for plaintiff in error, insisted that the declarations of Moyers, after he had parted with his interest to Smith, should not be received, and cited Greenl. Ev. §§ 171, 172, 180; 1 Stark Ev. 28, and Note A.

SNEED & TEMPLE, for defendant in error, cited 3 Hayw. 255; Meig's Dig. 470, 5.

McKINNEY, J., delivered the opinion of the court.

This was a suit commenced before a Justice of the Peace of Cocke county, upon a note under seal, executed by Inman to Moyers for seventy-five dollars, payable in current Bank notes, at twelve months, and dated 22d July, 1848; which note was afterwards sold and transferred, by delivery, to Smith, who commenced the present suit thereon, on the 16th of August, 1849.

The Justice rendered judgment for the plaintiff, and the cause was removed by *certiorari* into the circuit court of Cocke county, by the defendant.

[*Moyers for Smith's use vs. Inman.*]

On the trial in the circuit court, the defendant was permitted to give in evidence to the Jury the admissions of Moyers, the payee and nominal plaintiff, *made after the transfer of said note to Smith*, to establish that said note was founded on a *gaming* consideration. This was objected by the plaintiff, but the objection was overruled, and the only question necessary to be considered is, was the evidence admissible? We think not. It is clear, that Moyers was an incompetent witness, upon the technical ground merely of being a party to the suit; though, under our act of 1825, ch. 29, but a nominal party. Such is the settled course of decision in this State, which we are not disposed to disturb. *Anderson vs. Brodie*, 7 Yer. R. 297; *Evans vs. Gibbs*, 6 Humph. 405.

But it by no means follows, as a consequence of the rule just stated, as seems to have been assumed by his Honor, that because Moyers could not himself be admitted to testify, therefore his admissions were competent evidence against Smith, without regard to the *time* such admissions may have been made. Whatever difference of judicial opinion may be found to exist upon this question, the weight of American authority clearly establishes, that the declarations or admissions of a party, though nominal plaintiff in the suit, made at a period *after* he has parted with his interest in the matter, and another person has acquired the exclusive right in the same subject matter, cannot be admitted in evidence to disparage the right or title of the latter, however it may affect the party himself making such declaration or admission.

This most just and equitable doctrine will be found, says Mr. Greenleaf, (Vol. 1, § 180,) to apply, not only to admissions made by bankrupts and insolvents, but to

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the cases of vendor and vendee, payee and endorsee, grantor and grantee; and, generally, to be the pervading doctrine in all cases of rights acquired in good faith, previous to the time of making the admissions in question. See cases referred to; Note 2; *Ib.* §§ 171, 172, 173.

It follows that the judgment must be reversed, and the cause be remanded for a new trial.

BILLINGSLY vs. RANKIN et al.

SUMMARY PROCEEDING. *Motion against Sheriff for an insufficient return. Defence that may be made thereto.* The remedy given by the Statute by motion against an officer for official delinquency, is merely a substitute for the more tedious and expensive common law remedy of an action on the case; consequently, whatever would constitute a valid defence for the officer in an action on the case, is equally available as a defence in the proceeding by motion.

SHERIFF. *When not liable for an insufficient return.* A Sheriff is not liable to the plaintiff for an insufficient return, if the delinquency is attributable to a statement of facts made to the Sheriff by the agent of the plaintiff.

This was an appeal in error from the judgment of the circuit court of Bledsoe county, at its July Term, 1852; GOODALL, Judge, presiding.

W. B. REESE, Jr., for plaintiff in error.

HYDE, for defendants in error.

[*Billingaly vs. Rankin et al.*]

McKINNEY, J., delivered the opinion of the court.

This was a motion for judgment against the defendant, Rankin, as former Sheriff of Marion county, and his sureties, for failure to make due and proper return of an execution, placed in the hands of one of his deputies, in favor of the plaintiff, against one Smith, for four hundred and ninety-three dollars and twenty-seven cents, issued from the office of the circuit court of Bledsoe county. The motion was refused by the circuit court, and the case comes here by an appeal in error.

The *return* is as follows: "Come to hand the 24th Sept., 1850. Levied on one hundred and thirty acres of land on the north-west side of Sequatchy river, in the first civil district of Marion county, adjoining the lands of Jeremiah Hatfield, Williams' heirs and others, this 26th — 1850." "E. A. LEAGE, Dep. Sh'ff."

"Offered the within land for sale at the court-house door, and there was no bidder. This 8th November, 1850. E. A. LEAGE, Dep. Sh'ff."

On the hearing in the circuit court, it was proved, that said execution was placed in the hands of said Deputy Sheriff, by the son of the plaintiff, who at the same time, informed said deputy, that the defendant in the execution *had no personal property*, but that he had a piece of land, which must be levied on forthwith, or he might make way with that also; and urged said deputy to go and levy on the land immediately, and he accordingly made the levy on the land the same day.

The question upon this record, is not, as to the sufficiency of the *return*, in itself considered; nor as to the duty imposed by law upon the officer in such case; but simply this: whether or not the plaintiff, upon the proof

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in this case, can hold the Sheriff liable to a judgment on motion for the insufficiency of the return; and we hold it to be clear that he cannot.

The remedy given by the statute, *by motion*, is merely a substitute for the more tedious and expensive common law remedy of *an action on the case*; consequently, whatever would constitute a valid defense for the officer in an action on the case, ought to be equally available as a defense in the statutory proceeding by motion.

There is, as declared by Lord Mansfield, an essential difference between actions of *trespass* and *actions on the case*. The former are *stricti juris*; but the latter are founded upon the mere justice and conscience of the plaintiff's case, and are in the nature of a bill in equity. Hence, whatever in equity and good conscience would, under the circumstances of the case, preclude the plaintiff from a recovery, may be given in evidence, under *the general issue*, to defeat the action. 1 Chitty's Pl. p. 649, American ed., 1840.

To declare in this case, that the plaintiff might hold the sheriff responsible for a *return* made, upon a statement of facts furnished by his own agent, and at his own urgent solicitation, is a proposition too monstrous to require more than to be stated. There is no error in the judgment, and it will be affirmed.

HUFF & WALLIN vs. MILLER & WOODS.

PRACTICE. *Writ of error. Revivor. Scire facias.* If after judgment in an inferior Court, against two or more defendants, one of them die, the surviving defendants may bring a writ of error, and if the administrator of the deceased defendant wishes also to prosecute the writ of error, the proper practice is to suggest and prove the death of his intestate, and thereupon a *scire facias* will be awarded at the instance of the administrator, uniting the twofold office of a *scire facias* to revive the decree against the administrator and a *scire facias, ad audiendum errorea*.

The facts necessary to be stated are contained in the opinion.

PECK, for Wallin & Huff.

MAYNARD, for Miller & Woods.

MCKINNEY, J., delivered the opinion of the court.

This is a writ of error brought to reverse a decree in chancery, and sought to be prosecuted under the Act of 1811, ch. 72, § 12, by filing a certified transcript of the record with the clerk of this court. A preliminary question of practice is submitted for our determination, arising upon the following state of facts. At the May Term, 1851, Miller & Woods obtained a decree against Huff & Wallin for five hundred and eighty dollars and ninety cents besides costs. On the 13th of May, 1852, before the expiration of twelve months from the rendition of the decree, a transcript of the record was filed in this court.

After the final decree, but before the filing of the record with the clerk of this court, Wallin, one of the defendants, died; and his administrator seeks to join with Huff, the surviving defendant, in the prosecution

[Huff & Wallin vs. Miller & Woods.]

of this writ of error, without having taken any other step than merely to join in filing the record, and in the execution of the bond for the prosecution of the writ of error. And the question is, can he be allowed to do so? We think not.

The right of the administrator of Wallin to prosecute a writ of error to reverse the decree against his intestate, if erroneous, cannot be questioned. But, under the circumstances of this case, a different practice must be adopted from that required, by the Act of 1811, were the party himself living, and applying for the writ of error.

We know of no settled practice in this court, in a case like the present; and in establishing a rule of future practice it seems to us proper, and indispensable, that the death of Wallin should be first suggested to the court, and proved; and that, thereupon, a *scire facias* should be awarded, at the instance of the administrator, uniting the twofold office of a *scire facias* to revive the decree against the administrator, and a *scire facias ad audiendum errores*. And this course the administrator may pursue in the present case. Should he decline to do so, there can be no doubt of the right of Huff, upon the suggestion of Wallin's death, since the decree was rendered, to prosecute the writ of error alone. It is unquestionably true, that where a joint judgment is rendered against several persons, the writ of error, to reverse such judgment, must be brought jointly in the names of all the parties, if living. If some refuse to join in the prosecution of the writ of error, they must be summoned, and served, before the others can proceed alone. 4 Yerger 148; Tidds' Prac.

[Pearce vs. Hawkins.]

But if, after judgment, one of the parties should die, it seems that the survivor may bring a writ of error. 3 BL. Com., 407, note 3; 1 Stra., 234.

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OFFICER. *Acts of an officer de facto as they affect third persons, and as affecting himself.* One who is ineligible to the office of constable, although invested with the forms of office, and although his official acts will be deemed good and valid as to third persons, in the same manner as if he were an officer *de jure*, cannot, when put on his own defense, justify under his office.

This was an action of Trover in the circuit court of Bradley county. At the September Term, 1851, KEITH, Judge, presiding, there was judgment for the defendant, and plaintiff appealed in error. The only facts necessary to be noticed are stated in the opinion.

TREWHITT, for plaintiff in error, cited M. & Yerg., 287; 5 Yerg., 271; 2 Yer., 337; 6 Tenn. Rep. 123; 9 Mass. Rep., 235; 10 *Ibid.*, 301.

ROWLES and GAUT, for defendant in error, the latter of whom insisted that, an officer *de facto* is bound to do the duties of his office, and is liable for failing to do so in the same manner as if he were an officer *de jure*. 3 Ire. R., 171-74; *Bank of the United States vs. Dandridge*, 12 Wheaton's R., 878; *Dean vs. Gridley*, 10 Wendal, 254.

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An officer *de facto* may defend his acts, as such, under legal process. *Patten vs. Luther*, 3 Johnson's R., 431; *Berryman vs. Wise*, 4 Tenn. R., 366. Where an action has been commenced by an officer *de facto* of a corporation, no other person claiming the right to act as the officers of the corporation, the defendant cannot be permitted to show, for the purpose of defeating the action, that the officers were illegally elected. *Angel & Ames*, 224-5, § 4, page 226.

When one acts under a colorable title to an office, his title can only be examined before the supreme court, and that directly. *McKinn vs. Somers*, 1 Penn. R., 297; U. S. Digest., vol. 3, page 72; 7 Johnson's R., 549. Where an officer attempts to enforce a legal right by action, he must show himself properly qualified; but where the action is *against* the officer, it is sufficient if he is shown to be an officer *de facto*. *Fetterman vs. Hopkins*, 5 Watts, 539.

In justifying an entry under legal process, it is not necessary to prove the fact that the officer was one *de jure* as well as *de facto*. *Datty vs. Gorham*, 4 Pick., 487; U. S. Digest, 3 vol., 72.

TOTTEN, J., delivered the opinion of the court.

Trover for a horse. The defendant justifies the seizure and sale of the property in question, in virtue of his office of constable, and the process in his hands. But as he was resident in the tenth civil district when elected constable for the eleventh, he was ineligible to the office, and his appointment was void.

And in an action against him for an alleged trespass, he cannot defend and justify the act, as being done

[Colville vs. Neal & Sellers adm'rs.]

in virtue of his office, when it is made to appear that he has no title thereto, and that his assumed appointment was illegal and void.

It is true, that being invested with the forms of office, his official acts will be deemed good and valid as to third persons in the same manner as if he had been an officer *de jure*. But when put on his own defense, he cannot justify under his office, if it appear that he is not a legal officer, but only an officer *de facto*. If this were not so, then there is no difference between a legal and an illegal appointment to office, and an officer *de facto* is the same as an officer *de jure*, which is absurd.

Reverse the judgment, and remand the cause for a new trial.

COLVILLE vs. NEAL and SELLERS, Adm'rs.

JURISDICTION. *Justice of the Peace. Execution issuing in one county upon judgment rendered in another.* An execution issued in one county upon a judgment rendered in another, in pursuance of the provisions of the Act of 1805, ch. 66, § 4, must recite the fact that it is issued on an execution certified from the county in which the judgment was rendered, and parol or extrinsic proof will not be heard to supply the omission.

The defendants in error recovered a judgment against Pennington and the plaintiff in error, as stated in the opinion, and executions issued as therein stated. The plaintiff in error, after the levy of the execution upon

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his property in Rhea county, upon his petition obtained writs of *certiorari* and *supersedeas* for the purpose of quashing the execution in the circuit court. At the July Term, 1852, KEITH, Judge, presiding, judgment was rendered, from which the plaintiff in error appealed.

SMITH and TREWHITT, for plaintiff in error, cited 6 Yerg., 481.

GAUT, for defendants in error.

TOTTEN, J., delivered the opinion of the court.

It appears that Neal and Sellers, the plaintiffs in the court below, recovered judgment against Henry Pennington and said Colville, the latter as stayor, before a justice Ford, in Warren county, on the 20th August, 1842, for ninety-five dollars and seventy-seven cents. An execution was issued thereon "to any lawful officer of Warren county," on the 29th March, 1851. We assume that it was properly certified under the Act of 1805, ch. 66, § 4, so as to form the basis of an execution in another county, to which the debtors may have removed. On the 29th April, 1851, an execution was issued on said judgment, by Justice Paine, in the county of Rhea. It recites the judgment in Warren, but makes no reference to a certified execution thereon. We have had occasion to say, that as this peculiar jurisdiction rests wholly upon the statute, its material provisions must be complied with, else the proceeding is unauthorized and void. *Eason vs. Cummins*, 11 Humph. R. 210; *Morgan vs. Hannah*, 11 Hum. R. 122.

A justice of Rhea has no power to issue an execution on a judgment before a justice in Warren, unless

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an execution thereon, issued in the county of Warren, be certified under the statute, to the county of Rhea. The execution so certified, stands as a judgment before the justice in the county of Rhea; and he must recite in his execution thereon, that it was issued on an execution certified from the county of Warren.

Prima facie, he has no jurisdiction of the matter, and his execution is void; but if it recite the special case provided by the statute, then the jurisdiction appears, and the execution is valid. No such recital appears in the present case, and the execution is therefore void. We cannot connect it by parol and extrinsic proof with the proceeding in Warren.

The judgment of the circuit court will be reversed; the motion of the plaintiff in error to quash the execution be allowed, and the execution be quashed.

Judgment reversed.

BUTLER vs. WINTERS.

LIMITATION OF ACTIONS. *Summary proceedings. Surety.* The statute of limitations applies as well to the remedy given sureties who have paid the debt of their principals, as to the actions of assumpsit or debt.

SAME. *What promise of the debtor will prevent the bar.* An absolute and unqualified admission of an existing debt which the debtor is willing to pay, or an express promise to pay the debt will obviate the bar of the statute.

The judgment in this case, from which the plaintiff appealed in error, was rendered in the manner and upon

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the facts stated in the opinion, at the July Term, 1851, of the circuit court for Anderson county, ALEXANDER, Judge, presiding.

RODGERS & BOYD and MAYNARD, for plaintiff in error.

LYON, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

This case is a motion in the circuit court of Anderson to recover money paid by the plaintiff, as surety of defendant. There was judgment for defendant, and plaintiff has appealed to this court.

It appears that plaintiff was surety of defendant in a note to Kirkpatrick, dated March, 1838, for seventy-five dollars, and that in 1842, he paid the same on his liability as surety. The motion was made more than six years after payment of the money.

The defendant relies upon the limitation as a bar. On the contrary, the plaintiff insists that the statute does not apply to these summary proceedings by motion, because they are not named in the statute.

The motion is given by statute in special cases of merit, instead of the more dilatory remedy by action of assumpsit or debt. To these actions the limitation expressly applies, and we think it a just and reasonable construction that it be held to apply likewise to the motion, which is merely a substitute for the action.

In the one case, the issue appears in the pleading; in the other, it appears in the proof; and in both, the proof must, of course, be the same.

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In the next place, it is insisted for the plaintiff that there was an admission of the debt, and a promise to pay within the term of limitation.

The admission of an existing debt which the debtor is willing to pay, or an express promise to pay the debt will restore the remedy that was barred, and entitle the plaintiff to recover. *Thompson vs. French*, 10 Yer. R. 456; *Belote vs. Wynn*, 7 Yer. R. 534; *Hunter vs. Starks*, 8 Humph. R. 658.

But the admission or promise to have this effect, must be absolute and unqualified. This being the rule of law, we have carefully considered the proof in the present case, and we are satisfied that it is not such as to enable the plaintiff to obviate the bar of the statute. There is some conflict in the proof tending to raise a doubt as to the nature and extent of defendant's admission or promise. We do not deem it necessary to state in this opinion, an argument upon the evidence. It could be of no utility in any other case. But the conclusion of fact that we deduce from the evidence, is simply this: the defendant offered to pay some forty dollars of said debt, provided plaintiff would take it on defendant's account against him for house rent. This offer was made just after the parties had closed a settlement of mutual demands extending back for a period of ten years; the surety debt and the account for house rent not being included in the settlement. They were mutually denied, no doubt. One witness speaks of an absolute promise to pay forty dollars. If this were so, it would be good *pro tanto*; and it would, of course, have been included at the time in the balance of accounts, as no objection could be made by either party. But if the promise were contingent, as from admitted facts and the evidence of other witnesses,

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we believe it to have been, then it is not sufficient, as before stated, to obviate the bar. If the proposal as made had been assented to, it would doubtless be valid between the parties according to its terms.

Let the judgment be affirmed.

TRUSTEES OF McMINN ACADEMY *vs.* RENEAU *et als.*

ACTION. Joinder of Parties. Since our statute which makes all joint contracts, in effect, joint and several, and permits the plaintiff to proceed against so many of the parties or obligors as he may think proper, the plaintiff may sue upon several bonds jointly those who are obligors in each of the several bonds although there may be other obligors, some of whom have signed one bond and some another.

MISNOMER. Corporation. Where a bond has been executed to a corporation by a name varying from the true name, the corporation may sue in its true name, and aver the execution to the bond to it.

This was an action of debt instituted in the circuit court of Hawkins county by the Trustees of McMinn Academy against Reneau, George R. Powell and Wm. Miller, upon two bonds executed by Reneau as Treasurer of the Board of the Academy, the one in 1843, with George R. Powell, W. D. Kenner and Wm. Miller as his sureties; the other in 1844, with Geo. R. Powell, Wm. Miller, J. Miller and H. Tartar as his sureties. To the declaration the defendants pleaded in abatement and the plaintiff demurred thereto. The court sustained the demurrer as to the declaration and gave judgment

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for the defendants, from which the plaintiffs appealed in error.

HEISKELL, for plaintiffs in error, argued: There is no misjoinder of parties, for the parties are the same in all the counts.

There is no misjoinder of causes of action. Different causes may be joined in the same declaration, where the same plea may be pleaded, and the same judgment given in all, or where the counts are of the same nature, and the same judgment may be given on all. 1 Chitty, 200, stated to be a universal rule; 1 D. & E., 274, cited in 2 Saund., 117, note 2; and *Union Cotton Manufacturing Company vs. Lobdel et als.*, 13 Johns. 462.

The universality of the rule questioned in Gould on Pl., ch. 4, § 92; 1 Tidd's Pr., 12; but the instances given, and the grounds taken do not cover this case.

But different causes of action in debt, may be joined as debt on record, specialty and simple contract. 1 Tidd Pr., 12; or on an amercement, 1 Chitty, 209; or on several leases, 8 Co., 87; Archb. Cr. Pl., 174; or on several bonds, *Cabell vs. Vaughan*, 1 Saund., 291; or on a penal statute, and for money had and received, *Jaques vs. Whitcomb*, 1 Esp. Rep., 361; or Covenant on several deeds, Cro. Jac., 329; 1 Lev., 110; Archb. Pl., 174; or Detinue for Charters & Chattels. *Ib.*

The ultimate destination of the fund, or the ultimate liabilities of defendants, as between themselves, does not control this view. 1 Chitty, 19, and 202; (10 Am. Ed.;) and cases there cited.

The suit is well brought in the name of the corporation, averring that the bond was made to it by the name therein stated. See *Mutual Relief Society vs. Va-*

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rick et als, 13 Johns., 38; *Willis vs. Burnett*, 2 Starkie R., 29; *Rex vs. Roper*, 1 Starkie R., 518. See also 1 Chitty, 256, note 2, and cases there cited; *Ib.* 247, note 4, and cases there cited. See *Grafton Bank vs. Flanders*, 4 N. Hamp., 239, cited in *Banker's Magazine*, February, 1852, p. 645.

T. A. R. NELSON, for defendants, argued: The demurer goes back to the first fault in pleading. 2 Meigs Dig., 810, No. 1468.

The two bonds cannot be jointly sued on. Counts requiring different pleas and judgments cannot be joined. 2 Meigs, 813, No. 1477. The liabilities upon the two bonds are different and distinct. To allow them to be joined in one suit would produce inextricable confusion. There are *parties* to both bonds not sued. Suppose an entire judgment is rendered, how could we have a judgment over on motion, and split the judgment so as to have an apportionment of it to each set of securities? See the general rule, 1 Chitty's Pl., 200, 411.

As to joint plaintiffs, see 1 Chit., 3; 2 Meigs, 813, No. 1481; 816, No. 488.

The securities in the second bond are not liable for any default which arose under the first, and *vice versa*; and though causes *depending on the same principle* may be consolidated, as in *Dews vs. Eastham*, 5 Yerg, 297; yet, as the different defendants in each bond might have separate defenses not depending on the same principle, there is a misjoinder of causes of action, and of parties defendant. 2 Meigs, 813, No. 1477.

McKINNEY, J., delivered the opinion of the court.

In the court below, judgment was rendered for the defendants, upon the plaintiffs' demurrer to the defen-

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dants' pleas in abatement, on the ground, that the declaration, to which the demurrer reached back, was substantially defective. The alleged defect in the declaration, is, a misjoinder of counts, or causes of action. And the question is, did the court err in its judgment upon the demurrer.

It is well settled, as a general rule, that where the plaintiff has several causes of action, of the same nature, all accruing to him in the same right, and against the defendant in the same character or capacity, they not only may, but ought to be joined in one action, by several counts in the declaration. The policy of the law favors such joinder, and if several actions are brought, the plaintiff may be compelled to consolidate them, at his own costs.

The *test* given in some of the books, by which to decide as to the joinder of counts, namely, that the same *plea* may be pleaded, and the same *judgment* given on all the counts of the declaration, is by no means universally correct. The proper criterion seems to be, that the causes of action, set forth in the several counts, are of the *same nature*, and require, at common law, the same judgment, a *capiatur*, or a *misericordia*, although the pleas may be different; as in debt on judgment, on specialty, and on simple contract, which may all be joined in one action, though the plea to each count may be different. Chitty's Pl., 200; Gould's Pl. ch. 4, §§ 79 to 99.

Applying these general principles to the case under consideration, we think it clear, that the judgment of the circuit court is erroneous. Here, the bonds declared on in the several counts, are the official bonds of the *treasurer* of the board of trustees: the one for the year

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1843, and the other for the year 1844. The defendants, G. R. Powell and William Miller, were sureties to both bonds. The other sureties to said bonds, who are not sued in this action, were not sureties to both. W. D. Kenner was only a surety to the bond of 1843; and Jacob Miller and Henry Tartar were only sureties to the bond of 1844.

It is urged, that the parties to the two bonds being, as to some of the persons, different, this of itself constitutes a sufficient reason why a joint action cannot be maintained upon said bonds. Had all the sureties to both bonds been sued in this action, this argument would have been well founded. But the rule of the common law, which required, that upon joint contracts, the parties should all be sued; and that upon joint and several contracts, the plaintiff should proceed against all jointly, or each separately, being altered by our law, which makes all joint contracts, in effect, joint and several, and permits the plaintiff to proceed against so many of the parties, or obligors, as he may think proper; the argument, we think is of no force. The plaintiff having the election to sue some of the joint obligors, and to omit others; and the persons sued in the present action, being parties to each bond, the case rests upon precisely the same ground, so far as the question of misjoinder is concerned, as if there were no other parties to said bond; the bonds described in the different counts, are to be regarded as the bonds of the defendants alone.

Again: it is said that in a joint recovery and judgment, upon both counts of the declaration, the several liabilities of the sureties, on the different bonds, will be so confused and blended, that in a proceeding by them respectively, for indemnity and contribution, against

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their principal and co-sureties, their rights cannot be adjusted, because it cannot be ascertained what amount of damages was assessed upon either bond.

No such consequence need ensue, if the proceedings are properly conducted. Separate damages should be assessed by the jury upon each count of the declaration; and the judgment of the court, in pursuance thereof, should be for the recovery of the penalty of the bond described in the first count, to be discharged by the payment of the damages assessed by the jury upon that count; and likewise for the recovery of the penalty of the bond described in the second count, to be discharged in like manner; stating the aggregate amount of damages for which execution is awarded.

2. The misnomer of the corporation is no ground of objection. The first bond is made payable to William Simpson and others, by the description of "Trustees of the *McMinnville* Academy in Hawkins county," &c.; and the corporate name is "*McMinn* Academy." It has been held, and we think properly, that where a deed is made to a corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and aver in the declaration that the defendant made the deed to them, by the name mentioned in the deed. 10 Mass. Rep., 360, 363; 13 Johns. Rep., 38; Angel & Ames on Corp., 584, (third edition.)

The result is, that the judgment of the circuit court will be reversed, and the demurrer to the pleas in abatement be sustained, and that the defendants answer over to the declaration.

RICHARDSON, *adm'r., &c., vs. COLE et als.*

TRUSTEE. *His powers limited by the terms of his appointment.* When the power and authority of a trustee are defined and limited by the terms of the trust, he can make no other disposition of the trust fund than such as is directed; and hence, if a debt which is intended to be secured by the creation of a trust fund for its payment, be in any manner extinguished, without the use of the trust fund, the trustee holds the funds subject to the order of the bargainor in the trust deed, and cannot otherwise divest himself of the title with which he is clothed, than by a surrender to the bargainor, or in the event of his death, to his properly appointed personal representative. Should the debt be extinguished after the death of the bargainor, and before the appointment of his administrator, the title to the trust fund is in *abeyance*, and cannot be levied upon by virtue of an execution issued against the bargainor, before his death, until the appointment of an administrator.

The facts upon which the court predicated its judgment in this case, are fully stated in the opinion.

RODGERS & BOYD, for complainant argued: In this case the levy was made after the death of Peterson; and the deed of trust was in full force at the time of the levy, and none of the property in the deed of trust had been sold by the trustee; and inasmuch as the title to the negro in dispute, was, by the deed of trust, vested in the trustee, and was not in Peterson, there could be no lien on said negro from the teste of the execution, because the title was not in the intestate, but was in the trustee; and there being no lien at intestate's death, the levy and other proceeding after his death was a proceeding against a dead man, and therefore wholly void.

SNEED & TEMPLE, for respondent Sweat, and MAYNARD, for the other respondents.

McKINNEY, J., delivered the opinion of the court.

[Richardson, adm'r. &c., vs. Cole et al.]

We think there is no error in the decree in this cause.

The material facts in the case are these: On the 25th of July, 1843, Peterson, the complainant's intestate, executed a deed of trust, conveying thereby, the slave, *Susan*, and other personal property, to Cole, as trustee. The objects of said deed, were, to secure the payment of a debt to Thomas Weir, of one hundred and seventy-five dollars and eighty three cents; to secure Robert Morrow, who was endorser for Peterson on a note for about three hundred and fifty dollars, held by the Branch of the Bank of Tennessee at Rogersville; and likewise to secure Calvin Peterson, as endorser on a note for three hundred dollars, to Franklin Academy, in Campbell county.

Peterson, the maker of said deed, died on the 15th of February, 1844, intestate, and no administration on his estate was granted till December, 1844.

On the first of January, 1844, two judgments were recovered against said Peterson and others, as his endorsers, in the circuit court of Campbell. Upon these judgments, executions seem to have issued in the lifetime of Peterson, but they remained unexecuted until after his death, to wit: the 5th of March, 1844, on which day the Sheriff proceeded to levy on the slave, *Susan*, and other personal property, for their satisfaction.

It appears that the defendant, Morrow, who was one of the beneficiaries in said deed of trust, repudiated the indemnity provided for him, and renounced all benefit under said deed. And on the — day of April, 1844, Cole, the trustee, proceeded to sell the property embraced in said deed, except the slave, *Susan*, the proceeds of which were sufficient for the satisfaction of the debt for which Calvin Peterson was liable, and the debt to Weir, except about the sum of thirty-eight dollars. This

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balance, the defendant, Cary, and one John Queener, the intestate of defendants, Cary & Morrow, paid to Weir, which fully discharged the debt secured to him by said deed of trust. Upon this being done, the trustee was induced to deliver the slave, Susan, over to the Sheriff, to be sold by him by virtue of the levy of the executions before mentioned. This was done by the procurement of Cary and Queener, (who were personally interested in the satisfaction of one of said judgments, and liable for the same,) and who, in order to induce the trustee to surrender said slave to the sheriff, executed a bond of indemnity to the trustee, and similar bond to the sheriff. Thereupon, the sheriff, by virtue of the executions, and seizure aforesaid, sold said slave, on the 20th of April, 1844, to the defendant in the original bill, William Sweat, for the sum of four hundred and twenty-seven dollars, which was applied in exoneration of Cary and Queener's liabilities.

After the grant of administration to the complainant, Richardson, finding that the estate was utterly insolvent, he made a suggestion thereof, as required by law, and thereupon brought this bill to have the sale of said slave declared void, and to have the slave surrendered to be administered under the statutes for the administration of insolvent estates. And Sweat brought his cross-bill to have the purchase money refunded, upon the ground of *fraud* in the sale, and other grounds, which it is not important to notice.

The chancellor granted the relief sought by the original and cross-bill. And the defendants, Cary and the administrators of Queener appealed to this court.

There is no sufficient ground, in our opinion, for impeaching the deed of trust executed by Peterson to

[Richardson, *adm'r. &c.* vs. Cole *et als.*]

Cole, and we hold it to be a solid security for the debts provided for, except so far as respects the debt for which Morrow was liable; he having renounced the benefit of the *personal* indemnity provided for him in said deed.

The case then turns upon the effect of the surrender of the slave by the trustee to the sheriff, and the sale of the latter.

In the first place, the arrangement between Cary and Queener, and the trustee, for the satisfaction of the balance of the mortgage debt, with a view to the release of the slave from the lien of the deed of trust, and for the surrender of the slave to the sheriff, having been made after the death of Peterson, and before administration on his estate, was wholly inoperative and void. The trustee had no authority to make any such adjustment, or surrender. His power and authority were defined and limited by the terms of the trust. If, by the execution of the power conferred upon him by the deed, or in any other mode warranted by law, the debts provided for were satisfied, leaving the slave undisposed of, he had no power, by any act of his own, to divest himself of the legal title, or to surrender the possession of the slave to any one, other than the properly appointed personal representative of Peterson. Until the appointment of such representative, there was no person in being in whom the legal title to the slave could rest; no one entitled to demand or receive possession of said slave. The interposition of Cary and Queener was an officious and unwarranted interference, on their part, which could have no other effect, in law, than to subject them to personal liability for such wrongful interference.

[Richardson, *adm'r. &c. vs. Cole et als.*]

In the next place, the execution sale was a mere nullity. It is certainly true, that the executions in this case, having been issued in the life time of Peterson, might have been levied, after his death, upon any property of a personal nature; at least, of which, at the time of his death, he was the legal owner. But here, the legal title to the slave had been divested out of Peterson, and vested in Cole, during the life of the former, by operation of the deed of trust; so that at no time, from the execution of said deed till the death of Peterson, had he any such interest in the slave, Susan, as could be reached by an execution at law. And even admitting, for the argument's sake, that the payment by Cary and Queener to Weir, could have the effect to discharge the lien, and divest the title of the trustee, the admission can avail the defendants nothing; because, upon this hypothesis, the legal title would remain in *abeyance* until the grant of administration on the estate of Peterson, and could not be reached by execution.

Inasmuch, however, as the parties, who are all before the court, have treated the slave as discharged from the lien of the deed of trust, we will so regard it for the present. And in this view, the complainant is clearly entitled to have the slave delivered to him; and the purchaser is entitled to a decree against the defendant Cary, and the administrators of Queener, for the purchase money and interest; Sweat accounting to the estate of Peterson for the reasonable hire of said slave during the time he had her in possession.

And the defendants, Cary & Queener's administrators, will be allowed the balance paid by them to Weir in satisfaction of his debt, as against the administrator. And forasmuch as said sum formed a lien upon the slave,

[Jones vs. Williams.]

Susan, they will be entitled to priority, to the full extent of such payment, over all other creditors, in the event the assets should prove insufficient for the payment of all the debts.

Decree affirmed.

JONES vs. WILLIAMS.

POOL. Property of, exempt from execution. Certiorari and superedeas. When property which is exempt from execution has been levied upon under an execution issued by a justice of the peace, a proper remedy for the defendant in the execution is to remove the proceeding into the circuit court by certiorari and there have the levy quashed.

CERTIORARI. Practice. When the certiorari is resorted to merely for the purpose of correcting an abuse of the execution issued by a justice of the peace, it is in the nature of an *audita querula* and if the petition be dismissed the court should award a procedendo to the justice in whose office is the judgment, as the judgment in such case remains in full force, not being affected in any manner by the certiorari.

As stated in the opinion, a judgment in this case was rendered against the defendant in the circuit court, from which he appealed in error.

C. W. HALL, for plaintiff in error.

CROZIER, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

[Jones vs. Williams.]

This case came into the circuit court on petition for certiorari. The injury complained of is, that the property of the debtor exempt by the poor laws from execution, has been levied and taken at the instance of the creditor. The petition prays that this illegal levy be quashed.

We see no objection to this mode of redress for the injury complained of. It is an abuse of process to levy it on property of the debtor, exempted by law from execution, in like manner as it is an abuse to levy it after the debt has been satisfied. The justice who issued the execution has no power to correct this abuse, but the circuit court, in virtue of its general revisory jurisdiction, may supercede and quash the levy. It is true, that the officer and the creditor also, if he advise the levy, are liable to an action for the value of the property thus illegally taken, and the officer is subject to indictment as for a misdemeanor, (1820, ch. 11, § 1;) but the object of the poor laws is, to secure the poor in the possession and use of the means necessary for their subsistence.

The remedy by action implies, that the exempted property has been taken from them, and that the recovery of its value will be a full compensation for the injury. But, in the mean time, they may greatly need it for their comfort and subsistence. The little corn they have may be needed for bread; an only horse be needed for the plough; and so of other necessary articles. The present mode of redress prevents the injury from being consummated, and permits the exempted property to remain in the possession and use of the debtor. Nor can any inconvenience result from this practice, for the judge may, if he think it proper, submit the issues of fact to a jury, as in other cases of contested facts.

[*Alexander and wife vs. Lisby et al.*]

The circuit court dismissed the petition, and entered judgment for the amount of the judgment before the justice. The petition was subject to be dismissed for not stating whether any former supersedeas had been granted. The Act of 1821, ch. 7, is peremptory on this point. But the action of the court was improper in rendering judgment for the debt. There was already a judgment for that before the justice, remaining in full force, and it was not intended, by the present proceeding, to revise or disturb it. The object was merely to correct an abuse of the execution. The proper action was, to give judgment for costs and award a *procedendo* to the justice, (*Kincaid vs. Morris*, 10 Yer. R. 252,) the certiorari being, in the present case, in the nature of an *audita querela* at the common law.

The judgment will be reversed, and the proper judgment be rendered in this court.

Judgment reversed.

ALEXANDER and wife vs. LISBY et al.

PRACTICE. *Prosecution bond. Amendment. Attachment.* It is competent and proper for the chancellor, where it appears that the bond given for the prosecution of an attachment bill is defective, and the complainants ask to be permitted to amend it, to allow such amendment to be made or such new bond to be given as the statute requires.

This was a bill filed in the chancery court at Knoxville, attaching the property of defendant Lisby. The

[*Alexander and wife vs. Lisby et al.*]

bill was dismissed, as stated in the opinion, Chancellor WILLIAMS, presiding, and the complainant appealed.

RODGERS & BOYD, for complainants.

WILLIAM SWAN, for respondents, cited 4 Humph., 311-12.

McKINNEY, J., delivered the opinion of the court.

This is an attachment bill. At the appearance term, the defendants moved to dismiss the bill, on the ground that the attachment bond was not in compliance with the requirements of the statute. The motion was allowed, and the bill ordered to be dismissed. But on a subsequent day of the same term, the chancellor, (without, in express terms, rescinding the order of dismissal), made a further order, by which leave was given to the complainants, on or before the next March Rules, to execute a new and sufficient bond, and providing that, upon such bond being given, the cause "shall be proceeded in, as though said bond had been given on the issuance of the attachment, subject to all legal exceptions in allowing said bond to be given." Within the time limited, the complainants complied with this order, by executing a new and perfect bond; nevertheless, the chancellor, at the next succeeding term of the court, dismissed the bill, for the reason, as is alleged at the bar, that the leave given to amend, by the substitution of a new bond, was improper, and not allowable by law.

We do not coincide in opinion with the chancellor. In permitting the complainants to substitute a sufficient bond there was nothing erroneous or improper. The case referred to, (*Bank vs. Fitzpatrick*, 4 Humph., 311), so far

[Collins vs. Hipshire.]

from denying the propriety of allowing such an amendment, (if asked for in the court below,) tacitly admits it; but very properly holds, that it is not error in the chancellor to omit making such order of amendment when not asked for. The leave to amend being proper, and the amendment having been made in conformity with the order, the chancellor erred in afterwards dismissing the bill on the ground assumed.

The omission to rescind the first order of dismissal, is unimportant; as the subsequent order, granting leave to amend, was a virtual revocation thereof.

The decree will be reversed, and the cause will be remanded, and reinstated on the docket of the chancery court.

COLLINS vs. HIPSHIRE.

GRANT. *When and to what extent presumed. Adverse possession.* Twenty years possession under a claim of ownership is presumptive evidence of a grant. If the party in possession, however, have no paper, title under which he claims, such as deed, title bond, entry or the like, defining his boundaries, his possession will be limited to his actual occupation or enclosures, and it will not be extended by marked lines merely. The same rule applies in such cases as that which governs in the case of an adverse possession under the Act of 1819, ch. 28, § 2.

This was an action of trespass *quare clausum fregit* in the circuit court of Grainger county brought by Hipshire against Collins. On the trial the plaintiff read a Tennessee grant to himself for one hundred and eighty

[Collins vs. Hipshire.]

acres, dated June 21, 1834, and founded on an entry dated March 28, 1829. Plaintiff also proved that he had lived within the boundaries described in this grant for fifty three years, claiming to the boundaries as marked. The defendant read a grant to himself for twenty-five acres, dated July 13, 1830, founded on an entry, dated February 17, 1827. This twenty-five acres is within the boundaries of the one hundred and eighty acre grant read by the plaintiff, and it was upon the twenty-five acres so granted to the defendant that the trespass, (cutting trees,) was alleged to have been committed. The plaintiff's improvements or enclosures did not include any part of the twenty-five acres, though he had claimed the one hundred and eighty acres, on a part of which he had lived for more than twenty-five years, having at no time, however, any other title than his grant above mentioned. The defendant had no improvements of any kind on the twenty-five acres. The circuit court charged the jury, "That a possession of a party, without color of title, claiming to certain marked boundaries for twenty years before the commencement of the suit, would authorise the presumption of a grant to those boundaries, without any recognition of the boundaries by the adjacent owners, or any entries or grants, calling for the lines." There were verdict and judgment for the plaintiff and the defendant appealed in error.

Upon the foregoing facts the court held, TOTTEN, J., delivering the opinion:

The instructions to the jury are erroneous. It is true, that when a party has twenty years possession of land,

[Collins vs. Hipshire.]

claiming to be owner, a grant will be presumed to the extent of the possession. But as to the character and extent of the possession, upon which a grant may be presumed, they are governed by the same principles which govern in the case of an adverse possession under the *second* section of the act of limitations of 1819, ch. 28.

If the tenant have any color of title; as for instance, an entry or title-bond, defining the limits of his claim, his possession will extend to such limits. But if he have a mere naked possession, without any color of title, his claim must be confined and limited to his actual possession; that is, to his enclosures or actual occupation, and it cannot be extended by a claim to marked lines merely. What is actual possession is another question, not here involved, or at least, not necessary to be stated.

Reverse the judgment and remand the cause for a new trial.

Judgment reversed.

SEVIER et als. vs. BROWN.

CONSTRUCTION OF WRITINGS. *Will.* Testator, Thomas Brown, made the following bequest: "To my wife I give all my household furniture and farming tools of every description, and the one half of all my stock of every description not disposed of; and I give her the following negroes, to-wit: Manuel and his wife, Nancy; big Phil; Samuel and Nancy, his wife; boy Henry Clay; Malinda and child, Winston; and after her death, if not disposed of by her, after her death to go to the children of Mary Caroline Sevier, (after her death,) and the use and benefit of my man Handy, during her life, with the use and benefit of my land and ferry her life time, and Arch and wife." *Held* that an unlimited power of disposal is conferred upon Mrs. Brown by this clause, and that a remainder, created to depend upon the non-disposition of an estate by the first taker, who has an unlimited power of disposition, is void.

This was a bill filed by complainants in the chancery court at Kingston, alleging that they had a remainder interest in the property mentioned in that clause of the will of Thomas Brown, quoted in the opinion, and that the widow of Thomas Brown was about to sell or dispose of a portion of the property, to prevent which they prayed the injunctive interposition of the court. The chancellor, WILLIAMS, decreed that Mrs. Brown had an unlimited power of disposal, and the complainants appealed.

SNEED & TEMPLE, for complainants argued: The great rule in the exposition of wills is, that the intention of the testator shall prevail, provided it does not conflict with any rule of law; and in ascertaining that intention, the whole will is to be looked to, and not merely detached passages. Another rule is, to give effect to all the words, without rejecting or controlling any of them, if it can be done by a reasonable construction; *Black. Com. Vol. 1, Book 2, top page, 307.* A third rule is, that if the words will bear two senses, one agreeable to, and another against law; that sense be preferred which is most agreeable thereto. *Id.*

[*Sevier et als. vs. Brown.*]

The words in the will, "and after her death, if not disposed of by her, after her death to go to the children of Mary Caroline Sevier, after her death," plainly show an intention on the part of the testator to leave a remainder interest in the slaves to the children of Mrs. Sevier. If he intended to give her the entire interest, why did he use the expression, "after her death," three times? It is evident he felt great solicitude about his grand children, and that he wished them to have these negroes at the death of his wife. To dispose of them thus, is consistent with the idea of the most tender affection for her. At her death they will have answered the purpose for which they were given, that is to wait upon and support her. How natural then that he should give them to his grand children, for whom he had the most tender regard, instead of leaving them to go to his wife's heirs.

Again: after he had used the only expression relied on by respondent, to wit: "if not disposed of by her," he goes on to say, in an independent member of the sentence, "after her death, to go to the children of Mary Caroline Sevier." If he had intended her to have them absolutely, why would he have used those words? Why would he attempt to dispose of them after her death? In the codicil, where it is admitted the entire interest in the slaves, *Bob* and *Mingo*, is given to her, there is no such language used; there is no attempt to dispose of her absolute property after her death.

Regarding it as clear that the words in the last part of the sentence, if standing alone, would give the remainder interest to the children of Mrs. Sevier, then the expression "if not disposed of by her," is either to be regarded as surplusage, and therefore to be rejected, or, as conferring on her the power of defeating the remain-

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der interest which is unequivocally created by the following words. The intention to qualify the estate in remainder, or to confer the power of defeating it on his wife, would render the remainder void for uncertainty. But if the intention to give a remainder interest is plain, the intention to qualify it would be illegal, and therefore void. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. 6 Peters R. 79.

The intention to give the remainder to the grand children, will not be defeated unless it be indispensable. If two clauses in a will are repugnant, they are to be reconciled, if possible, by a reasonable construction, rather than reject either of them. In the construction of words very similar to the ones now under consideration, Chief Justice Marshall, in the case of *Smith vs. Bell*, in 6 Peters 79, referred to above, says: "If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out; yet *both clauses are equally the words of the testator, are equally binding, and equally claim the attention* of those who may construe the will. We are no more at liberty to disregard the last member of a sentence than the first. No rule is better settled, than that the whole will is to be taken together, and is to be so construed as to give effect, if possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of the words."

In the construction of wills, it is a rule that the *last* of two contradictory clauses prevails over the first.

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Black. Com. 1 Vol. Book 2, 307; Roberts on Wills, 2 Vol. 230; Meigs' Dig., Vol. 2, 1045.

CROZIER, for respondent.

GREENE, J., delivered the opinion of the court.

The only question in this case is, whether the complainants, children of Mary Caroline Sevier, take a remainder interest in certain negroes, which they claim under the following clause of the will of their grandfather, Thomas Brown: "To my wife I give all my household furniture and farming tools of every description, and the one half of all my stock of every description not disposed of; and I give her the following negroes, to wit: Manuel and his wife, Nancy, Big Phil, Samuel and Nancy, his wife, boy Henry Clay, Malinda and child Winston, and after her death, if not disposed of by her, after her death to go to the children of Mary Caroline Sevier (after her death,) and the use and benefit of my man Handy during her life, with the use and benefit of my land and ferry her lifetime, and Arch and wife."

We think it clear that an unlimited power of disposition is conferred on Mrs. Brown by this clause. In the first place, the testator gives these negroes and other property by general unrestricted words, and the gift of the remainder to the complainants, is then made to depend upon the contingency that the property shall not be disposed of by his wife. This shows, that so far from having an intention, by the creation of a remainder, to limit the estate first given to his wife, he expressly excludes such an interpretation by declaring

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that this remainder is to take effect, if the estate "is not disposed of by her."

The remainder thus created, to depend upon the non-disposition of an estate by the first taker, who has an unlimited right, and power of disposition, is void.

The case of *Smith vs. Bell*, as decided by this court, (Mart. & Yerg. Rep., —) has been uniformly followed in many cases which need not be referred to, rather than the judgment of the supreme court of the U. S. in the same case in 6 Peter's R.

Any argument in favor of the rule of decision adopted by this court, would be superfluous.

Affirm the decree.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE MIDDLE DIVISION.

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NASHVILLE: DECEMBER TERM, 1852.  
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VANLEER *vs.* CRAWFORD.

GUARANTY. *Guarantor's liability.* On the 26th January, 1849, A. W. V. executed the following instrument of writing: "I do hereby guarantee the payment of any contract Sam. Lanier may make for the hire of negroes during the year 1849, to be used at his iron works, or any iron works in which he may be interested in Decatur or Perry county, Tennessee." After the date of this guaranty, C. hired to Lanier's agent, six negro men, and the agent executed to him a promissory note for the amount to be paid for the hire. Appended to the note was a memorandum that C. might, at any time, avoid the contract, unless A. W. V. should also sign the note for the hire. At the time of the hiring, C's agent having no knowledge of the guaranty executed by A. W. V., addressed a letter to him informing him what had been done, and to which he received the following reply: "I have given Mr. Sam'l B. Lanier my written guaranty for the hire of all the negroes he may need at his furnace during the year, 1849. The negroes alluded to in your favor of the 29th ult., will, of course, be embraced. You may consider me as bound for the hire of them." Only three of the negroes entered into Lanier's service. A. W. V., after these transactions, in a bill which he had filed in the chancery court, admitted his liability for the hire of negroes employed by Lanier. *Held* that in an action of covenant against A. W. V., on the guaranty of 26th January, 1849, C. might recover the value of the hire of the three slaves.

[Vanleer vs. Crawford.]

This was an action of covenant instituted in the circuit court of Davidson county, upon the facts stated in the opinion. At the June Term, 1852, MANEY, Judge, presiding, there was judgment for the plaintiff, and the defendant appealed in error.

EWING & COOPER, and HOUSTON, for plaintiff in error, argued: The covenant is not a guaranty, but a general letter of credit. It is only a proposition to guaranty the payment of certain specified liabilities of Samuel Lanier, and as such, it should have been accepted by Crawford, in this case, and he should have notified Vanleer of its acceptance, in order to bind him. But these facts do not appear in the cause. They are not proved, and could not be, because they did not exist. 1 Devx. Law., 404.

It is necessary that the guaranty be accepted; there must be a *mutual assent* that it shall have operation. A mere offer to guaranty is not binding unless duly accepted. Chitty on Con., 500, and in note 1 on same page, it is said: "In the Supreme Court of the U. S. it is settled, that in order to charge a guarantor upon a letter of guaranty, addressed to a particular person, or to persons generally, for a future credit to be given to a party in whose favor the guaranty is drawn, it is necessary that notice should be given to him, that the person giving the credit has accepted or acted upon the guaranty, and has given credit on the faith of it. 12 Peters, 207; 10 Peters, 482; 7 Cranch, 69; 7 Peters, 113;" and various other authorities are cited; 2 American Leading cases, 30; 4 Greenl., 521; 6 Greenl., 60; 7 Greenl., 115.

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The letter of McNeil, as Crawford's agent, is not a notice to Vanleer of the acceptance of his guaranty. McNeil says they were hired to Lanier upon the condition that Vanleer would become his security, and the memorandum, or condition at the bottom of the note shows that it was the understanding that A. W. Vanleer was to sign the note with Mr. Lanier, and should he not do so the negroes might be taken back by Crawford at his pleasure. This is substantially the notice that was sent to Vanleer, and it had no reference to his guaranty. He was also notified that *six* negroes had been hired to Lanier, upon condition that he would become his surety, and he is sued upon a contract for the hire of *three* instead of *six*.

Vanleer answers; refers to his guaranty, and says: "the negroes alluded to in your favor of the 29th ult., will, of course, be embraced. You may consider me as bound for the hire of them." He virtually refuses to become surety upon the note; refers to his guaranty as the basis of his obligation, and as the only way in which he will be bound. But Crawford never notified him that he accepted the guaranty, if he intended to accept it; but, on the contrary, he shows by his conduct, that he did not accept it; for he fails to send the six negroes to Lanier. He sent only three, and one of them, about the last of March, when the hiring was from the 29th January.

The answer of Vanleer to McNeil's letter, is, in substance, a change of the character of his letter of credit, so far as Crawford is concerned, from a general to a special letter of credit, addressed to Crawford. Its meaning is, "You may consider me bound for the hire, as guarantor, of any negroes Lanier may hire of you." This is the light in which Crawford viewed it, as is shown by

[Vanleer vs. Crawford.]

his changing the first contract, from the hire of *six* to the hire of *three* negroes. And this being so, Crawford was bound to notify Vanleer that he accepted the guaranty, in this shape.

If Vanleer is liable at all, it is upon his letter to McNeil and not upon the guaranty. And if so, the action should not have been *covenant*, but *case*.

But even if the contract for the hire of the *six* negroes had been made upon the faith of the guaranty, and Vanleer had been notified of the fact, he would not be bound; because he was notified of a contract for *six* negroes and would only be bound upon such a contract. The plaintiff himself broke the contract of which Vanleer had notice; he could not even sustain a suit upon *that contract* against Lanier, the principal, and of course he could not maintain a suit against the surety or guarantor. The conduct of Crawford and Lanier shows that the contract of which Vanleer had notice, was abandoned, and that they either made a new contract for the hire of *three* negroes, or that the *three* negroes were sent to Lanier without any express contract, but upon an implied assumpsit on the part of Lanier, to pay Crawford the value of the hire of the negroes; and in either of these events, it was the duty of Crawford to notify Vanleer of the facts, and that he accepted the guaranty.

MEIGS and JNO. A. McCAMPBELL, for defendant in error, argued: As the hiring was not to become obligatory on Crawford, if Vanleer refused to become surety for payment of the hire, and he did actually agree to be liable three days before the hiring, the guaranty and the hiring are really one original and entire transaction, and the consideration extends to, and sustains the promise of the

[Vanleer vs. Crawford.]

principal debtor, and also of the guarantor. 3 Kent's Com., 122-3.

In this case, Crawford was not bound to accept the guaranty; he might have insisted on Vanleer's signing the note. But he might waive the latter, and accept the guaranty, and his permitting the slaves to remain with Lanier, was an acceptance of the guaranty in law; and if he chose to accept it, he could act upon it without further communication, because the guaranty is an *absolute present guaranty*, not a mere *proposal to guaranty*. 2 H. Bl., 613; 9 East, 348; 6 Bing., 244; 2 Bouvier's Inst., 56.

But if Vanleer was entitled to notice of the plaintiff's acceptance of the guaranty, and also to notice of the hiring, McNeil's letter to him proves that he had both. For the letter tells him, that the negroes had been hired, and hired, too, on the condition that he would be *security* for the hire; and he answers, I have already agreed to become surety for the hire of all the negroes Lanier may need this year at his works, and the hire of yours is of course embraced in my agreement; and you may consider me bound.

To discharge a guarantor, there must not only be want of notice, in a reasonable time, but there must be also some loss or damage sustained by the guarantor. 1 Story's R., 35-6; *Woodson vs. Moody*, 4 Humph., 303-309; Meigs' Dig., 1088.

McKINNEY, J., delivered the opinion of the court.

The plaintiff in error, was sued in covenant, upon a *guaranty*. Verdict and judgment were rendered against him, and an appeal in error has been prosecuted to this

[Vanleer vs. Crawford.]

court. The instrument of guaranty was executed on the 26th of January, 1849. It is under seal, and is in the following words:

"I do hereby *guaranty* the payment of any contract that Sam. Lanier may make for the hire of negroes, during the year 1849, to be used at his iron works, or any iron works in which he may be interested in Decatur or Perry county, Tennessee."

It appears that, on the 29th of January, 1849, three days after the date of said guaranty, Crawford, the defendant in error, by his agent, McNeil, hired to Lanier six negro men, for the year 1849. The contract was made through Lanier's agent, James A. Falls, who, at the time, executed the following note.

"\$690. On or before the 25th of December next, we, or either of us, promise to pay John W. Crawford six hundred and ninety dollars, for the hire of Jim, Squire, Tom, Henry, Nathan and Isaac, from now until that time; and further agree to let said boys come home twice during the year, and furnish them the usual clothing customary at iron works.

SAM'L B. LANIER,

"per JAMES A. FALLS."

Under which note was written the following memorandum.

"The understanding is, that A. W. Vanleer is to sign the above note with Lanier; and should he not do so, the boys may be taken back at any time, and payment at the same rates from now until they return home, to be made.

"January 29th, 1849.

SAM. B. LANIER,

"per JAMES A. FALLS."

The proof shows that at the time of making this contract, the guaranty had not been received by Falls, the

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agent of Lanier; but he gave assurance that Vanleer would become bound for the hire. And on the same day the contract of hiring was entered into, McNeil, Crawford's agent, addressed a letter to Vanleer, informing him, that he had hired to Falls, for Lanier, six negro men, belonging to Crawford, for six hundred and ninety dollars, due the 25th December, following, on condition that he, Vanleer, should become bound as security, for the payment of the same. To which letter Vanleer returned the following answer, dated Nashville, February 5th, 1849. "I have given Mr. Sam'l B. Lanier my written guaranty, for the hire of all the negroes he may need at his furnace during the year 1849. The negroes alluded to in your favor of the 29th ult., will, of course, be embraced. You may consider me as bound for the hire of them."

It appears from the proof, that only *three* of the six negroes hired from Crawford, were received into the service of Lanier, during the year, 1849.

The bill of exceptions exhibits the copy of a bill in equity, filed by Vanleer, on the 24th of April, 1849, in which he admits his liability for the hire of negroes, employed by Lanier at his iron works establishment, for that year.

The present action is founded upon the foregoing guaranty, to recover the hire of three slaves in Lanier's employ during the year 1849.

The plaintiff's right to recover is resisted on the ground, among others, of failure to give notice of his acceptance of the guaranty, to the defendant. On this point, the cases present no little diversity of opinion. It seems to be admitted on all hands, that if the instrument does not express an absolute engagement, but

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merely a proposal, or offer to guaranty, the contract is not complete, until the party to whom the proposal has been made, has signified his acceptance of it. But as respects an absolute guaranty, the authorities are at variance as to the necessity of notice of acceptance. The supreme court of the United States seems to have established the doctrine, and it has been followed by the courts of most of the States, in which the subject has come under discussion, that the liability of a guarantor depends upon principles analagous to those which apply to an endorser. And the necessity of notice, either as respects the acceptance of the guaranty, or of the default of the principal to perform his agreement, is treated as an obligation of commercial, rather than of common law. On the other hand, it is held, and by American, as well as English authorities, that an absolute present guaranty, complete in its terms, and fixing the liability of the guarantor, takes effect as soon as it is made and acted upon. 2 Bouv. Inst., 56; American Leading Cases, 2 vol., 33 to 101, where the cases are collected.

For the decision of the case under consideration, it is not necessary that we should declare on which side, in our opinion, the weight of reason or authority lies; as we think, upon the peculiar facts of this case, the decision may be safely placed upon principles free from all controversy.

It may be observed, however, that if the case depended alone, upon the original guaranty of the 26th of January, 1849, which was enclosed in a letter from the plaintiff in error, to Lanier, it might be very plausibly maintained, upon the construction of that instrument, that any person who hired slaves to Lanier pursuant to

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its terms, and upon its faith, might support an action against the guarantor, without showing anything more than simply, that he had acted under it.

But the case does not rest alone upon the original guaranty. The correspondence between the respective agents of the parties before mentioned, has a most important influence upon its determination.

Vanleer was fully informed of the contract that had been agreed on between Crawford and Lanier, and the precise terms thereof: that six negroes had been hired by the former, to the latter, for the year 1849, for six hundred and ninety dollars, payable on the 25th of December of that year, and that this agreement was dependent upon the condition that he, Vanleer, would become security for the payment of the money, for which Lanier's note had been taken. To this Vanleer replied, tacitly declining to become security in the mode indicated, that is, by signing the note made by Lanier; but saying to the plaintiff: "I have given Sam'l B. Lanier my written guaranty, for the hire of all the negroes he may need at his furnace during the year 1849. The negroes alluded to in your favor of the 29th ult., will, of course, be embraced; *you may consider me bound for them.*" The effect of this letter, aside from the consideration that it is of itself perhaps, a sufficient guaranty, is to apply the guaranty, previously given, to this particular case, and places the liability of the guarantor upon precisely the same ground as if he had been present when the agreement between Crawford and Lanier was made, and had assented to be held bound thereby, upon his guaranty; or, as if he had then given the guaranty with reference to that particular contract of hiring. His subsequent assent, so far

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as regards the matter of notice of acceptance of the guaranty, is equivalent to a previous request, or an assent contemporaneous with the contract. In this view, the case steers clear of the conflict of authority in relation to the question of notice of acceptance. And perhaps, if necessary, the case might be placed upon another ground, clear of that question; namely, that construing the guaranty in connection with Vanleer's letter to the plaintiff, his undertaking might be regarded rather as in the nature of an original undertaking on his own part, to be bound for the hire of the negroes, than as a collateral or secondary liability for Lanier. But upon the facts of this case, the question as to notice of acceptance of the guaranty, is unimportant, after verdict, as upon the proof, more especially Vanleer's admission in his bill, the Jury were well warranted in the conclusion that he had notice of the acceptance, and of the contract between the plaintiff and Lanier on the faith thereof.

The objection that the contract guaranteed by Vanleer was for six slaves, and that but *three* of them were in fact received into the service of Lanier, cannot, in any aspect of the case, avail him. Why all the six slaves did not go into Lanier's service, does not appear, nor is it at all important to inquire, so far as respects the liability of Vanleer in the present case. The *number* of the negroes hired, was not of the essence of Vanleer's liability. He bound himself for *all* the negroes Lanier might need at his iron works; and it is not for him to make the objection, that the liability to which he is sought to be subjected in the present case, is less than by his specific undertaking, he had stipulated for. The converse of this position might present a more seri-

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ous question. The assumption upon which this objection is founded, namely, that a *new contract* was entered into between the plaintiff and Lanier, for the hire of the three negroes, to which neither the guaranty, or letter of Vanleer, had reference, has no foundation to rest upon in the proof.

There is no error in the judgment, and it is affirmed.

SMITH, adm'r., vs. PEARCE.

ACTION. Debt upon judgment. Administrator de bonis non. An administrator *de bonis non*, may maintain an action of debt upon a judgment recovered in the name of the executor who preceded him.

The judgment in this case was rendered at the March Term, 1852, of the circuit court for Rutherford county, DAVIDSON, Judge, presiding. The plaintiff appealed in error.

S. R. RUOKER, for plaintiff, cited 1 Williams' Ex'rs., 569, 570, 572, 596-7; 1 Barn. & Cress. 150; 2 Dowl. & Ryl. 271.

E. A. KEEBLE, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

Wright, as executor of McCulloch, recovered a judgment by confession for five hundred and fifty dollars, for

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a debt due to testator, against Alfred Pearce, in Rutherford circuit court, at its November Term, 1847. Wright died in 1851, without collecting this judgment, and the plaintiff was appointed administrator of the goods not administered, with the will annexed of the said McCulloch. Whereupon, this action of debt was instituted upon the said judgment. The declaration was filed at July Term of Rutherford circuit court, 1851, to which there is a general demurrer and joinder. The demurrer was sustained, and appeal to this court.

The only question is, will an action of debt lie in such a case?

An administrator *de bonis non*, succeeds to all the rights, powers, and duties of his predecessor in the administration; 1 Wil. on Ex., 596. He steps into his shoes, and takes up the business of the estate where he left it. The duties and powers of such an administration, relate back to the death of the person of whom he is the second representative. He has all the rights and powers over the assets, which remain unadministered, that his predecessor had. The duty and right to collect all the debts remaining uncollected, and not accounted for by the first administrator or executor, devolve upon him. This would apply to all choses in action of the deceased, whether in suit or not; and as well to judgments not collected, as to claims not sued upon. The only question is, are such notes, claims or judgments, assets of the estate represented by the latter administrator? If so, he has a right to recover them; 1 Chitty's Pl., 22. The principle is so far extended, as that an administrator *de bonis non* can sue on a promise made to a former administrator, and he may join counts or promises made to their intestate.

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Then, in this case, all that remains to be determined is, whether the plaintiff has adopted the proper mode of asserting this unquestionable right? It is argued, that he cannot bring an action of debt upon the judgment obtained by his predecessor. Why not? The judgment belongs to the estate, and not to the executor, Wright, in whose name it was recovered. The judgment is in his favor in his representative character, and does not vest in him individually. To be sure, he had full control over it, and could have released, discharged or collected it, by which he would have made it his own, and he and his securities would have been accountable for the amount to the estate. In that event, the judgment debtor would not have been liable to the suit of the administrator de bonis non. But if the judgment recovered by Wright, as executor, remained unsatisfied and unappropriated by him, the collection of it can certainly be enforced by the plaintiff, who succeeded to all his rights and powers in the matters of McCulloch's estate remaining unsettled.

Debt will lie upon a judgment. 1 Chitty's Pl. 111, 370.

There was, perhaps, no other way by which a judgment in favor of an administrator, who died before its collection, could be enforced by an administrator de bonis non, but to sue upon it, until act of 1851, ch. 20, gave the writ of *scire facias*. What more cheap and summary remedy might have been resorted to in this case by the plaintiff? But that statute does not take away the common law right of suing, but is merely cumulative, and the party may adopt either; 3 Greenl. 303. It is no ground of complaint by defendant, that the more dilatory mode of proceeding has been adopted by the plaintiff.

We therefore reverse the judgment below, sustaining

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the demurrer, overrule the same, and remand the cause for further proceedings.

GREENWOOD *et als.* vs. TENNESSEE MANUFACTURING Co. &
AGRICULTURAL SCHOOL.

MECHANICS LIEN. *Non-resident mechanics.* The statutes which give to mechanics and undertakers a lien upon the building, &c., for the value of their labor or materials furnished for its erection apply as well to persons who are non-resident as to those who reside within the State.

SAME. *Description of persons and materials not embraced within the statutes.* The statutes which provide a lien for mechanics, &c. do not apply to the merchant who furnishes machinery to be used in a building erected for manufacturing purposes.

This case was heard at the October Term, 1852, of the chancery court at Clarksville, Chancellor BRIEN, presiding. A decree was rendered, from which the parties appealed as stated in the opinion.

BAILEY, ROBB and HUMPHREYS, for the parties except Greenwood, argued: That Greenwood is not a *mechanic*, that he was a mere merchant, who sold materials that were used in the erection of the mill, and that the man who furnished the nails, locks and hinges, used about the mill, was as much entitled to the mechanics lien as was Greenwood.

The object of the legislature in passing the statute, was, to confer a favor on the laboring men of the country, by making sure to them the pay for their labor and

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material furnished, and was not intended to benefit the mere trader who might buy and sell for the purposes of gain.

But we contend further that, even if Greenwood was a mechanic, that he is a citizen of another State; sold and delivered the articles in another State, and as such is not entitled to the benefit of the provisions of our statutes conferring the mechanics lien. Those statutes were enacted for the benefit of our own citizens; to encourage and protect home industry; and not to confer a privilege on a foreign manufacturer who is or may be an alien; a stranger to our laws and institutions, and having no feeling or sympathy in common with us. If a citizen of the State of Ohio who has sold material used in the construction of a house is entitled to a lien on the property for the payment of the price of the material sold; so is a citizen of Liverpool for the iron or wares by him furnished, and the citizen of Japan or China for the wares or drapery by him sold and used in the construction or ornamenting of the house.

The statutes conferring the specific lien, known as the "mechanics' lien," are analagous to the statutes, known as the "poor laws," exempting certain articles of property from execution. And this court has holden that these statutes are intended only for our own citizens; and therefore refused the benefits of these statutes to a citizen of another State. See 11 Humph., 44.

HENRY, KIMBLE and SHACKLEFORD, for Greenwood, argued: The question here is whether a non-resident who furnished the mill machinery is entitled to a lien with other mechanics who built and furnished materials for the mill. It cannot be doubted but that Greenwood

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& Co. sold the machinery expressly for this mill and not for purposes of speculation by the purchasers, or as an article of merchandize. The acts of the legislature of 1825, ch. 37, and 1829, ch. 26, use the general language, "when any mechanic or mechanics, shall build or construct, or furnish the materials, shall have a lien;" &c. The first of these acts limits the lien to the building houses in the towns in the State, under special contract. The second of these acts extends the lien in favor of all who work or furnish materials in proportion to the amount of work done and materials furnished. By the act of 1835, the lien is extended to any mechanic who may build or furnish materials for any building in any county in the State.

The act commencing thus, "The lien given to mechanics who may construct, furnish materials," &c. We suppose it will not be controverted, that the machinery is to be considered material in the construction of the mill, or a part of its structure, as much so as building the foundation walls or erecting the superstructure, for without it there could be no mill. The machinery are fixtures, so considered in the case of *Morgan vs. Arthurs*, 3 Watts, 140. The case says a steam saw mill engine is subject to the mechanics' lien. And in *Gray vs. Hardship*, 17 Ser. & Raw., 413, the court says a boiler in a brew house is a fixture, and subject to the mechanics' lien under the Pennsylvania law.

The language of our acts of assembly granting the lien is general; "when any mechanic;" embracing all. There surely is nothing in the phraseology of the law to exclude a non-resident who furnishes any portion of the material of the mill. Then what principle of policy would dictate his exclusion? The States and the citizens

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of the States stand in a very different relation, to that of Japan and the other nations of the earth. The people of the States in forming their federal compact, looking to the importance of the relations of comity and unrestricted commerce between them provided a suitable guaranty. And in accordance with this constitutional provision, as well as the suggestions of mutual and reciprocal benefits, and the pleasures and advantages of social intercourse, it has long been the usage of the citizens of the States to deal and traffic, sell and barter, and purchase their respective merchandize, commodities, and manufactures.

It cannot be conceived that the legislature could have designed by any enactment, to have disturbed this state of amity and lucrative system of intercourse, by denying to a citizen of another State that remedial justice in her courts, Tennessee extends to her own citizens.

If the manufactures, the result of the skill and science of the citizens of other States, are important to us, and our citizens should choose, or feel themselves under a necessity, for the lack of similar skill, &c. in their own State, to purchase them, common morality would, it should seem, incline the legislature to provide suitable methods by which the foreign citizen should be paid in the manner directed for her own citizens. Especially as no detriment can grow out of it to the State or her citizens; but, on the contrary, many benefits.

CARUTHERS, J., delivered the opinion of the court.

The defendants erected extensive mills &c., at Port Royal, in Montgomery county, and failed. Several bills were filed by the complainants, and attachments issued

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to assert their lien as mechanics against the property. The Bank of Tennessee is also a party insisting upon its priority of right, as vendor by bond for title, for the unpaid purchase money, of about four thousand dollars. This right is conceded, and the contest is between the other parties. The various cases were consolidated. The sale of the property was made, and after discharging the debt of the bank, there still remains of the proceeds for distribution among the complainants, about three thousand dollars. The debts of complainants, which are declared by the decree below to be a lien upon the property, and to be paid pro rata, amount to five thousand three hundred and forty-three dollars. This sum is made up as follows: Greenwood's debt four thousand one hundred and three dollars; Wilder three hundred and sixty-five dollars; Durrell four hundred and seventy-five dollars; Stewart one hundred and nine dollars; Izor two hundred and ninety dollars. In addition to these complainants, McCauly & Johnson's decree amounts to six hundred and eighty-three dollars. As this claim was not for work done or materials furnished for the buildings, it was excluded until the others were satisfied. All the parties appeal on both sides, except Greenwood and the Bank of Tennessee.

The only question now made is, as to the correctness of allowing Greenwood to participate in this fund equally with the mechanics. It is contended that non-residents who furnish materials out of the State, are not embraced in our act of Assembly, but that it was only intended for our own mechanics, and for materials made in the State. We cannot concur in this construction. It would be against that comity and liberality that does, and should ever exist between us and our sister States. The provis-

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ions of the act is general, and we will not by construction, make the invidious distinction. We must then regard this claim with the same favor as if it belonged to one of our own citizens, and test the right of Greenwood by the same rules that we would do if he were a resident of Clarksville or Nashville, and had made the same contract.

The act of 1846, ch. 118, § 1, gives a lien to any mechanic or undertaker who may "furnish materials, or any part of the materials, in the construction, building or repairing of any house, fixtures or improvements, or shall do any work upon the said house, either by finishing off the same, painting, ornamenting or otherwise. *Such mechanic or undertaker shall have a lien,*" &c. Mr. Greenwood was an iron merchant, and contracted with the agent of defendant to furnish the iron and castings necessary for the factory, to be paid in part upon delivery in Cincinnati, and the balance in a bill on time. We do not believe that it was the intention of the Legislature to provide a lien, and thus give a preference over other creditors to him who sells to a company or an individual, machinery to put into a house built for manufacturing, any more than to a cabinet maker for the furniture to go into a new building, or to a merchant who may have sold nails, screws and locks, to an undertaker, or to the owner. But to whom is this lien given? To the mechanic or undertaker, by express words, both for work done by himself, or others under him, and for the materials such mechanic who contracts to erect the building, or any other person who may undertake it, shall furnish. This section does not apply to the person from whom the undertaker may get the materials; it does not give him any lien. He gives

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credit to the undertaker, and must look to him for his pay. If this were not so, there would be no use for the second section, which expressly extends the lien to others than those provided for in the first section.

"SEC. 2. That the provisions of this act, and the benefit of the lien hereby created, shall be *extended* to the journeymen workmen of said mechanic or undertaker, or such other persons as may be employed by or under him, to do any part of said work, or furnish any of the said materials, who shall be authorized to enforce the same in preference to said undertaker; Provided, notice in writing of said lien, shall be first given to the owner," &c.

By the first section, the lien was given to the "mechanic or undertaker," who might, "by special contract with the owner," construct, build or repair, or furnish the whole or any part of the materials for any house, &c. But as the undertaker might not be responsible, the second section extended the lien to any person that might be employed by or under him, to do any part of the work, or furnish any of said materials. Then if materials are furnished by contract with the undertaker, the lien is given to such person, in preference to said undertaker. But this lien depends upon giving notice to the owner. The object of which is, that he may withhold from the undertaker, with whom he has contracted, the amount of such claim. The second proviso demonstrates the correctness of this construction. *And provided further*, "That the claims herein secured by lien, for work and labor done, or material furnished, shall in no case exceed the amount agreed to be paid by the owner or proprietor, in his original contract with the undertaker." If this were not so, and it was intended to give

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a lien to all who might furnish materials or machinery for a building, why would it be limited to the amount agreed to be paid to the mechanic, or other person who undertakes the building? What would be the necessity for any reference to that contract? The whole object of the act might be defeated by the opposite construction. A mechanic agrees to build a house for a factory, for a certain amount, and lays out large sums for materials and workmen, and looks to the lien given him by law for his security; but, at the same time, the owner, by whom he is employed, makes a contract for fifty thousand dollars worth of machinery, and breaks; when the machinist comes forward with his large claim, and overwhelms him. This could not have been the intention of the legislature. It thought "the laborer was worthy of his hire," and intended to secure it to him. Mr. Greenwood's contract was with the owners, and had no connection with the undertakers. His case is not provided for in this act, but the claims of the other complainants are, as they worked as mechanics on the building. It is true he has acquired a lien under the act of 1832, by the registration of his judgment at law and filing his bill, but that is subordinate to the lien of these mechanics given by the act of 1846. They must therefore be first paid, and the balance of the fund, after the payment of all costs, will go to him.

Upon the two grounds, then, stated in this opinion, we consider the decree of the chancellor erroneous, and it must be modified as above stated, and the cause remanded.

KEATON *vs.* THOMASSON'S *lessee.*

LIMITATION OF ACTIONS. *Adverse possession of lands by a judgment debtor, after a sale thereof by the sheriff.* While it is true that a judgment debtor, if he remain in possession of land after a sale thereof by the sheriff, is regarded, in the absence of all evidence to the contrary, as occupying the relation of *quasi* tenant at will to the purchaser; nevertheless, if so retaining the possession, he claims to hold for himself and adversely to the purchaser, for seven years from the date of the sale by the sheriff, he is protected, by the statute of limitations, in his possession. This is so, though the action be brought within seven years from the execution of a deed by the sheriff to the purchaser.

This action of ejectment was tried at the February Term, 1851, of the circuit court for Cannon county, SAMUEL ANDERSON, Judge, presiding. There was judgment for the plaintiff, and the defendant appealed in error.

READY and FARE, for plaintiff in error, cited 8 Yerg., 179; 1 Humph., 80; 3 *Ibid.*, 129; 7 *Ibid.*, 517; 8 *Ibid.*, 685; 1 Murphy's Rep., 206; 2 Hawk's R., 568.

E. A. KEEBLE and G. W. THOMPSON, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of ejectment, in the circuit court of Cannon, brought by the defendant against the plaintiff in error.

The lessor of the plaintiff claims title to the premises described in the declaration, under a purchase at execution sale.

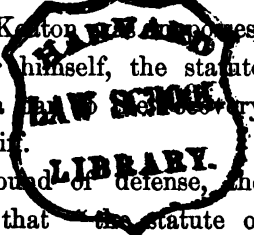
On the 18th of January, 1839, Thomasson recovered a judgment against Keaton, in the circuit court of Cannon, upon which an execution issued, and was levied on the tract of land first described in the declaration.

On the 12th of May, 1840, said tract of land was sold by the sheriff, and Thomasson, the judgment cred-

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itor, became the purchaser; but the sheriff's deed, conveying to him said tract of land, was not executed until the 23d of December, 1844.

The present action was commenced on the 15th September, 1848, against Keaton, the judgment debtor, who was in the actual possession of said tract of land, at the time of the levy and sale, and who has ever since continued in possession thereof, "claiming to hold for himself."

More than seven years having elapsed between the sale of said tract of land, and the commencement of this action, during all which time Keaton was in possession, claiming to hold the land for himself, the statute of limitations was relied upon, as a  defense sought by the lessor of the plaintiff.

And with reference to this ground of defense, the circuit Judge instructed the jury, that "the statute of limitations did not commence to run in favor of the defendant, until after the sheriff's deed was executed" to the lessor of the plaintiff.

This instruction was clearly erroneous. It is true, that the effect of an execution sale, of real property, is very different from that of personal property. The levy of an execution upon personal chattels, divests the title of the debtor, and vests it in the sheriff; and by the mere force of the sale and delivery of possession to the purchaser, he becomes vested with a legal title to the property purchased. But such is not the legal result in the case of real estate. The levy of an execution upon land does not divest the title of the judgment debtor. It vests the sheriff with no interest in the property, neither the legal title or possession is transferred to the purchaser by force of the sale.

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The sheriff's deed, by operation of law, transfers the legal title to the purchaser, and he is left to resort to an action of ejectment to gain the possession, if withheld by the former owner. By virtue of the levy and sale alone, the purchaser acquires, at most, only an equitable title to the land purchased. 10 Humph., 24. But, as the sheriff's deed is founded on the levy and sale, it has relation, whenever executed, to such levy and sale, and vests the purchaser, by such relation, with the legal title, at least from the date of the sale, if not from the levy, which is the inception of the title. See 1 Hump., 80; 8 Humph., 685.

From the date of the sale, at least, the judgment debtor, in possession of the land sold, is in a condition to assert a claim adverse to that of the purchaser. The latter is immediately entitled to a deed, and to the possession of the land, if it can be acquired peaceably.

But whether he obtains a conveyance from the sheriff or not, is wholly immaterial, so far as respects the operation of the statute of limitations, in favor of the judgment debtor remaining in possession, and claiming to hold adversely, in point of fact, to the title acquired by the purchaser; for although it be true, that until the execution of the sheriff's deed, the purchaser has only an equitable interest or title, and therefore could not sue in ejectment to recover possession of the premises; still, it is no less true, that the statute of limitations of 1819, has precisely the same effect and operation upon equitable as upon legal titles, and alike protects the right of the person in possession holding adversely, as against both.

It would be absurd to suppose, that the mere delay, or negligence, of the purchaser in procuring a deed

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from the sheriff, could have the effect of preventing the bar of the statute from attaching in favor of the adverse possessor.

It is true, that the judgment debtor, if he remain in possession after the sale, is regarded, in the absence of all evidence to the contrary, as occupying the relation of *quasi* tenant at will to the purchaser. But, this is a mere presumption of law, which may be rebutted by showing that, in fact, he was holding adversely to the right of purchaser.

He is under none of the positive obligations growing out of the relation of tenant by actual contract.

His relation rests upon mere acquiescence, and may, by his own act, be put an end to at any moment. 10 Humph., 214, 221; 1 Swan, 3, 10.

It follows, that the judgment of the circuit court is erroneous and must be reversed.

LAWRENCE vs. LAWRENCE.

SLAVERY. *Parol gift of life estate in a slave.* A gift by parol, by the tenant for life, of a life estate in a slave, to the remainder-man, is void as between donor and donee.

This action of detinue was tried in the circuit court of Wilson county, at its May Term, 1852, DAVIDSON, Judge, presiding. There was judgment for the plaintiff, and the defendant appealed in error.

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E. H. EWING and G. W. THOMPSON, for plaintiff in error.

STOKES, for defendant in error, cited 10 Yerg. 487; 11 Humph. 144; 3 Ire. Eq. Rep. 253; 1 Dev. & Bat. 479; 2 *Ibid* 115; 2 Dev. Eq. R. 535; 9 Yerg. 64; 8 *Ib.* 384; 10 *Ib.* 507.

HOUSTON, Special J., delivered the opinion of the court.

This is an action of detinue for a negro slave named Jeff. Mary Lawrence was the owner of a life estate in the slave, and William Lawrence was the owner of the remainder. He was in the possession of William Lawrence at the time and before the suit was brought. A demand was made for the slave, but the plaintiff in error refused to deliver him up.

On the trial before the jury, William Lawrence proposed to prove that Mary Lawrence, in October, 1847, about two years before the institution of the suit, "surrendered, and gave up, by parol gift, her life estate in the slave to him, freely and voluntarily."

The court excluded the proof, and the jury found a verdict for Mary Lawrence. There was a motion for a new trial, and a motion in arrest of judgment; both of which motions were overruled, and to reverse the judgment, an appeal was taken to this court.

The only question presented is, whether a parol gift of a life estate in a slave, by the tenant for life, to the remainder-man, and accompanied by the possession, is valid between the parties under the act of 1831, chap. 90, § 12. This court has decided, that a parol gift of a

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slave, by one who owns the entire interest, is void as between the donor and the donee. Such is the plain meaning of the act of 1831; such is its policy, and such is the construction given by the court of North Carolina to a similar statute; *Neely vs. Wood*, 10 Yer. 486. Before the passage of this act, creditors were amply protected, and its object was, to protect the pretended donor from having his slaves taken from him by parol gifts, proved by the false swearing of witnesses. And all the reasons that can be offered in favor of the donor of the entire estate in a slave in such cases, and every consideration of sound policy apply with equal force, if not with greater force, to the donor of the life estate. The tenant for life is at least the temporary owner of the slave; this ownership may embrace the entire interest, or continue during the life of the slave; he may sell to a stranger, or make a gift of his interest, and deliver possession. The value of his interest may be equal to half, or more than half the value of the slave, as in this case it was found by the jury that the life estate of Mary Lawrence was worth four hundred dollars, the slave being worth about eight hundred dollars. Moreover, in perhaps a majority of the cases, the tenants for life are old women with little knowledge of, or ability to protect their rights, having no absolute estate in any kind of property; and in this case it appears that Mary Lawrence is 87 years of age, and the plaintiff in error, himself, offered to prove that she had made similar gifts of her life estate in all her other negroes, to her children, who owned the remainder; she having no other property in her own right, and leaving herself entirely destitute of the means of support. We can see no reason why the act of 1831 should not extend to this case;

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and we are satisfied that such should be its construction. We therefore affirm the judgment of the circuit court.

ROSS vs. YEATMAN.

PLEADING. *Non est factum*—when not necessary to be pleaded on oath. If the name only of the party charged be subscribed to an account, without any acknowledgement of the correctness of the account, or his obligation to pay it, except such as might be inferred from the fact that his name appears subscribed to the account, he may show that the signature is not his act, without pleading *non est factum* upon oath.

At the July Term, 1851, of the circuit court for Smith county, CULLOM, Judge, presiding, there was judgment in this action for the plaintiff, and the defendant appealed in error.

MOORE, for plaintiff in error.

FITE, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

The plaintiffs below, sued the plaintiff in error and Catron, as partners upon account for merchandize. The items constituting the amount are not given, but for them reference is made to bills rendered. At the foot of the accounts thus stated, these words are written,

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without more, "Catron & Ross, by G. W. Catron." Catron made no defense, but Ross proposed to prove, that at the time the signing was done by Catron, that no partnership existed between them, and that Catron had no authority to sign his name. This evidence was excluded by the court upon the ground that it could not be made without a plea of *non est factum* on oath.

The broadest description of cases in which the defense by plea of *non est factum*, is required to be on oath, is contained in the act of 1819, ch. 27, § 4, and is in these words: "When a plaintiff wishes to avail himself of the plea of *non est factum*, to any deed of record, defeasance or other acquittance, or a defendant to any bond, obligation, promissory note, bill of exchange, or other instrument of writing, for the payment of money or other valuable thing." This case is certainly not embraced in this act, much less is it covered by the anterior acts of 1801, ch. 6, § 55; and 1817, ch. 86, § 2. It is not a "bond, obligation, promissory note, bill of exchange, or other instrument of writing, for the payment of money." There is no writing above the signature, creating any obligation or promise, or undertaking of any kind. Nothing precedes the signature but a general account for merchandize, without setting forth the items. Then, if the case does not fall within some statute upon the subject, it is to be governed by the general rules of pleading, and the defense can be made without any affidavit of its truth.

For this error in the circuit judge, without noticing other defects in the case, as presented by the record, which might be fatal, we reverse the judgment, and order that the cause be remanded for a new trial.

WOOD *vs.* OWENS.

GAMING. *Horse racing. Action to recover back money lost thereon. Parties.*

Though horse racing under certain restrictions is so far tolerated by statute as to exempt the parties concerned from criminal prosecution, still in all other respects it is illegal, and no such relation as that of partners, or joint owners, or legal privity of any sort can be created between the parties. Hence if two persons join in a wager upon a horse race, which they lose, each must sue separately for his portion so lost and paid over to the winning party.

This was an action brought in the manner and upon the facts stated in the opinion, in the circuit court for Bedford county. At the August Term, 1852, DAVIDSON, Judge, presiding, there was judgment for the plaintiff and the defendant appealed in error.

E. COOPER, for plaintiff in error, insisted that, as it appeared that Harrison and Owens were jointly interested in the stake which was deposited by Owens, they should have sued jointly, and cited 1 Chitty Pl., 13; 1 Saun. Pl., 154; 9 East, 471; 10 Yerg., 235; Meigs' Rep., 394; 1 Swan, 38.

WISENER, for the defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of debt, brought by Owens against Wood, in the circuit court of Bedford, under the act of 1799, ch. 8, § 4, to recover back the sum of three hundred dollars *lost on a "horse race."* There was a verdict and judgment for the plaintiff below, and the defendant appealed in error to this court.

It appears from a paper writing, found in the evidence, that the agreement with the defendant, Wood,

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to run the race, was made ostensibly by the plaintiff, Owens, in his individual name; but the proof showed, that in reality, the money *bet* upon the race, was advanced by, and belonged to, said Owens and one Jacob Harrison.

The present action was brought, and the declaration filed, in the joint names of Harrison & Owens; but at the subsequent term of the court, and preceding the trial, on motion of their attorney, leave was given to amend, by striking out the name of Harrison from the summons and declaration, and this amendment was made without objection, so far as appears from the record. It being made to appear on the trial, that Harrison had an equal interest in the sum of money sought to be recovered back from the defendant, the position was assumed by the defendant's counsel, that because of the non-joinder of the former the plaintiff could not maintain this action. Upon this point, the circuit judge held, in substance, "that the written agreement between Owens and Wood, showing that they were the parties who made up the race, afforded the best evidence of the nature of the transaction," and that if Harrison was secretly concerned and interested with the plaintiff unknown to the defendant, Wood, and with whom he made no contract or agreement to run said race, that it was necessary to join him as plaintiff, &c.

We differ in opinion with his honor, as to the legal principles which govern this case. The right to recover back money lost, under the circumstances of this case, is in the face of the common law, and rests alone upon the statute before referred to, and the rule prescribed by the act, must therefore govern. The person provided for by the act, is the person "losing and paying or delivering" the money, or other valuable thing lost,

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on horse racing, or any other game or play whatever. The policy of the statute is, to restore to him the money, or property lost, or the value thereof, if sued for within ninety days thereafter, and the extent of the right of recovery is to be measured by the extent of the actual loss of money, or property, by the party. If this be a correct exposition of the statute, it follows that the present action is properly brought, and may well be maintained by the plaintiff, to recover *his own part* of the money lost, and paid over to the defendant, but for nothing more. The statute gives him no right to recover the money of another person, lost and paid over to the defendant upon the same race, merely upon the ground of some illegal association between the plaintiff and such other person in the horse race. Such other person has a right, under the statute, to complain, and sue for himself, and, if he declines to do so, no other person can be heard to complain for him, as against all others, the successful party in the race, by whom the money or property was received, may retain it, and in doing so, may well stand upon the maxim of the common law: "*Meliori est conditio possidentis.*"

It is to be borne in mind, that, although "horse racing," under certain restrictions, is so far tolerated by statute as to exempt the parties concerned from *criminal prosecution*, still, in all other respects it is illegal, and no valid contract, either express or implied, can arise out of such illegal transaction. Consequently, in legal contemplation, no such relation as that of partners, or joint owners, or legal privity of any sort, can be created between the parties by force of such illegal transaction. The rights of the parties, so far as recognized by the

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statute, must therefore, upon general principles, be regarded as *several*, and prosecuted accordingly. The case of *Gray vs. Wilson*, Meigs' R., 394, is wholly different from the present case, in its facts, and this is all that need be said of it at present.

It follows, in this case, that, as the plaintiff improperly recovered the share of the money belonging to Harrison, the judgment is erroneous.

Judgment reversed.

DORAN *et als.* vs. BRAZELTON *et als.*

PARTIES. *Chancery.* How persons of color held in slavery must sue for freedom.

Persons of color held in slavery can only sue for their freedom in a court of chancery by a next friend.

Chancellor RIDLEY, at the February Term, 1852, of the chancery court at Winchester, dismissed this bill, and the complainant appealed.

COLYAR, for complainants, argued: What is the condition of complainants? They are free persons under duress, wrongfully held in bondage; and must they forever remain in this condition, simply because they are not fortunate enough to have some friend who will take it upon himself to apply to court in his own name, for their emancipation? The very idea is startling. Upon demurer, all the allegations of the bill are admitted.

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And now the question comes up, and must be met directly: Shall the complainants remain in perpetual bondage without any fault of their own? It is not their crime, their error, nor their negligence, to have no next friend. They have no power to say to a white man, you must go to law for me, and become liable for heavy costs. And if the rule insisted upon by defendant be correct, in this country where the people are averse to the emancipation of slaves, but few of the hundreds of the African race, who are wrongfully held in slavery, after their emanipation, will ever obtain the aid of our courts. In such a case as this, where the costs may amount up to hundreds of dollars, there are but few men who would volunteer to become liable for it, to say nothing about the moral courage it would require to volunteer in behalf of an *de facto* slave against his master. Why does the law in any case, require a suit to be brought by a next friend? Only two reasons have been given: First, because of the supposed want of discretion. Secondly, that there may be some one liable for costs. Story's Eq. Pl., § 57.

Does either of these reasons apply in this case? Perhaps the first might apply to persons in the condition of these complainants at the time the original bill was filed; but could not apply to them at the time the supplemental bill was filed, because they were then free; they were not then in the condition of *femes covert*, or minors; but were capable of contracting, having been in fact freed by the will of their master, and the special legislation of Alabama.

And if the rule should be enforced as insisted on by defendant's counsel, for the second reason, it would be as to them, annulling the act of Assembly for the ben-

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eft of poor persons; but if there is nothing in the first reason, then of course there is nothing in the second.

In Alabama, slaves cannot be emancipated by will, unless the Legislature grant the privilege, which was done in this case, though at the time the bill was filed the complainants were only able to state that testator had procured special legislation on the subject.

This case, then, is not like the case of a slave emancipated in this State, and the executor refuses to apply to court for the assent of the State.

But even assimilate it to that case, and still the court would not be bound to dismiss the bill for want of a *next friend*. It is true, the act of 1829, ch. 29, confers upon a slave so situated, the power to file his bill by next friend: but the right to sue, is a right which he had at common law, and there is no prohibition to sue without a next friend.

Turning to the elementary works, we find but two classes of persons who sue by next friend: *femes covert* and *minors*; and I have been able to find no case where a bill was dismissed for want of a *next friend*.

Indeed, it is discretionary with the court, whether an infant sue in equity by his *prochein ami*, by his guardian, or by himself. See Story's Eq. Pl., § 58, note 3. So, also, a married woman, in cases where justice requires it, may sue in her own name. Story Eq. Pl., § 61; and in the case of *Lewis vs. Simonton*, 8 Humph., page 190, the court say: "the matter as to the person by whom the application shall be made, whether the former owner, the trustee, or one who stands in the relation merely of *next friend*, is regarded as mere form, and wholly unimportant." Now, the important question arises: shall the complainants be denied their

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remedy for the establishment of an important right, because of a supposed defect in what is regarded as mere form, and wholly unimportant.

What has been the practice, even in cases of ordinary bills, under the statute? Why, in a number of cases to be found in the books, persons of color have been permitted to file their bills in the chancery court to have their freedom declared, without a *next friend*.

The case of *Lewis et als. vs. Daniel, adm'r*, 10 Hum., 305; and *Henry et als. vs. Geren et als.*, 9 Humph., 182; *Nancy et als. vs. Wright et als.*, 9 Humph., 597; the case of *Elias et als. vs. Smith et als.*, 6 Humph., 33, are all cases according to the reports, where persons of color filed their bills and obtained the assent of the State, (or have their rights tried,) without a next friend.

And the cases of *Woodfolk vs. Sweeper*, 2 Humph., 88; *Stewart vs. Miller & Brown*, Meigs Rep., 574; *Blackmore vs. Phil*, 7 Yerg., 452, and *Harris vs. Clarissa et al.*, 6 Yerg., 227, are all actions of trespass, brought to try the question of freedom, without a next friend.

Then, there are other cases in both classes, which were brought by a next friend, showing that it is discretionary with the court, and that the courts, in fact, as is said in the case of *Lewis vs. Simonton*, regard it as matter of mere form, and wholly unimportant.

H. L. TURNEY, for respondents.

CARUTHERS, J., delivered the opinion of the court.

This bill is filed by eleven persons of color in their own names to establish their right to freedom against the defendants, who hold them as slaves. They charge,

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that they were the slaves of one James Doran of Jackson county, Alabama, who made his will in 1840, and died, providing for the emancipation of petitioners at the death of his widow. This bill was filed in the chancery court of Franklin county, in February, 1852, under the pauper act. The defendants answered it, denying the merits, and reserving the question of their right to file it in their own name. At the first term, (February, 1852,) an amended bill was filed. At the same term, defendants moved to dismiss the suit upon the ground that slaves can only sue by next friend, and not in their own names. This motion was sustained by the chancellor, and appeal to this court.

The case presents for our consideration the single question, whether by the laws of this State, persons of color, who are held in slavery, can sue for their freedom in their own names, and without a next friend. The question is said to be a new one, and the evils resulting from a decision of it either way are enumerated and pressed upon the court in the argument.

On the one side, it is said, that if they cannot be heard without the active agency and responsibility for cost, of some free person, they will often be deprived, as in this case, of most valued of all boons, the sacred right of freedom. That it would be a reproach upon our laws to deny a resort to our courts of justice to the down trodden and oppressed, because no one could be found to befriend them. On the other hand it is urged that if slaves were permitted to harrass their owners with suits and costs at pleasure, without some responsible free person to stand forward as their friend, and vouch for their cause, there would be no quiet

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and subordination in the community, and this species of property would be worthless.

But it is not our province to weigh and balance these considerations, but to pronounce the law. The legislature can, and should look to such inconvenience and hardships, if any such exist, but the courts cannot. They must administer the law as it is. It is not for them to say what the laws should be, but what they are. If liberty, the most valued of all rights, is withheld from any human being, who by the law, is entitled to it, because no mode has been provided for its successful assertion, and because none can be, consistently with the general and greater interest of the whole community, then on the score of public policy and self preservation of the greater number, it may be justifiable. These questions and considerations all belong to another department of our government, and not to the judiciary.

Then, what is the law on the question presented? We are aware of no adjudication of the point, or that it ever has come up in form before this court. It is said, and several cases are referred to in our reports, where there is no notice of a next friend, that such suits have been entertained by our courts without a next friend.

But no case is brought to our notice, and we are aware of none, where the question was presented for adjudication. Nor do we know of any case, where a suit has been instituted and entertained with this essential defect, and certainly, with our views of the policy of the country, we would not make such a rule if we had the power to do so. Whether the institution of slavery is an evil, either civil, political or moral, or

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whether it is the policy of the States, where it exists, to encourage and facilitate emancipation, are questions on which much has been, and may be said on each side, and which it is not our present purpose to discuss.

Our laws afford ample means to any who are unlawfully held in slavery, to assert and prosecute their right. The courts are open to them and an inclination always manifested to favor their claim, where it is at all sustained. They are generally taken out of the possession of the master, as in this case, and placed under the protection of the court, and time allowed them to prepare and prosecute their claim. In the liberality and humanity of the law, they find a safe reliance for the most efficient professional aid. The experience of our country also demonstrates that no difficulty is ever found where the claim is calculated to inspire the least confidence in its justice, in procuring the agency of responsible citizens to stand forth as next friend, in any suit which may be necessary to establish their claim of freedom. But still, if this were otherwise, our decision would have to be the same under the present state of our laws upon the subject. A slave can have no *status* in court except by a next friend. And in such cases a motion to dismiss may be made at any stage of the proceedings. No demurrer or plea is necessary. They are property, and have no rights except such as are extended to them by some law, and in this State we think these are, as they should be, sufficiently ample to satisfy all the demands of justice and humanity.

This inability to sue in their own names is not confined to slaves, but is extended likewise, with but few exceptions, to all persons under the age of twenty-one, and *femes covert*.

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It is not therefore an anomalous rule applying alone to slaves. In each case it is founded on sound reason, and the most enlightened policy, and cannot with safety be changed or revoked.

We think therefore that there is no error in the decree of the chancellor, dismissing the bill, and consequently affirm it.

ANDERSON vs. Lessee of CLARK's heirs.

SALE OF LAND. *By Sheriff, how vitiated.* A sale of land made by a sheriff by virtue of an execution, is not vitiated by the mere irregularity of the proceedings upon which the execution is founded; the sale is effectual to pass the title unless the proceedings are null and void.

SAME. *Land descended to heirs, how subjected to sale to pay debts of the ancestor.* The Acts of 1784, ch. 11, and 1822, ch. 43, which prescribe the proceedings necessary to subject real estate descended to heirs to the payment of the ancestor's debt, must be taken and construed together.

ADMINISTRATOR. *Pleading. Jurisdiction.* In an action against an administrator or executor, he may plead "fully administered," "no assets," or "not sufficient assets," and the plea may be tried in the forum where the action is pending. If in the circuit court, by a jury; if before a Justice of the Peace, then by the Justice. The judgment, however, in such case, if in favor of the administrator, is not conclusive against the heirs in a proceeding against them to subject the land descended to them to the payment of the debt. They may, to a *scire facias* issued for that purpose, plead that the administrator had assets, &c.

EVIDENCE. *Recitals of a sheriff's deed.* Recitals in a sheriff's deed that the purchaser, at the sale, had assigned his interest acquired by the purchase, to another person, and he to another, and that he (the sheriff) was ordered to make title to each successively, are to be taken as presumptive evidence that the sheriff was authorized to execute the deed to the last assignee.

This action of ejectment was tried in the circuit court of Davidson county, at its January Term, 1852, TURNER,

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Judge, presiding, when there was judgment for the plaintiff, and the defendant appealed in error.

MEIGS, for plaintiff in error.

TRIMBLE and EWING & COOPER, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

This is an action of ejectment in the circuit court of Davidson, for a lot of land in the city of Nashville. The lessors of the plaintiff derive title by descent from James Clark, their ancestor, who died intestate in 1832, seized of a valid, legal title to the land. John Peck became the administrator of said intestate, and was sued as administrator, before a justice of the peace in Davidson county, in two cases, by Gilbert G. Washington, a creditor of the intestate. The judgment in one of the cases is as follows—to wit:

“March 12, 1833. This came on to be tried before me on this day. The defendant appeared and pleaded that he had *fully administered*, and that there were notes, bonds, and judgments outstanding. I find that there are notes, bonds and judgments outstanding, more than sufficient to cover all the assets in defendant's hands, and therefore find his plea true; but, also, enter judgment against decedent's estate for the sum of nineteen dollars 62 1-2 cents, and costs of suit.

“WILLIAM LYTLE, J. P.”

On this judgment, execution was issued, on which the officer made return, in these words:

“No property to be found; this 10th April, 1833.

“ALLEN COTTON.”

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The papers were now returned to the circuit court, where a *scire facias* was issued, and made known to the heirs of said intestate, the object of which was, to have execution of the lands descended to them from said intestate.

At September Term, 1833, the parties appeared, and by consent, the pleas filed in said suit were withdrawn: The record proceeds to state that a jury "found for the plaintiff," and a judgment is rendered, that the plaintiff have execution for the real estate, descended from said intestate to said heirs, for his debt, &c.

On this judgment, execution was issued, and the land sold by the sheriff, January 18th, 1834, for ninety-seven dollars, to Peter Jonte. There were various other judgments in the county court, against said estate, in which costs had accrued to Henry Ewing, the clerk, in virtue of which, as the owner of the costs, as clerk, he redeemed said lands from Peter Jonte, who assigned and transferred his bid, and ordered the sheriff to make deed to Henry Ewing, by writing, dated 25th April, 1834.

There were other redemptions, transfers, and orders, to the sheriff, of the same character, down to John Shelby; to whom the sheriff executed a deed for said lot of land, February 9th, 1836, reciting therein, the judgments and sale, the assignments and orders before stated. The defendant in possession, deduces a regular title from John Shelby, and the case turns upon the validity of said sale. There was judgment for the plaintiff, and defendant appealed in error to this court.

1. It is now argued for the heirs, that both the proceedings before the justice, and before the county court, were irregular and void; that the title of the heirs was

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not divested, and that none was communicated to Peter Jonte, the purchaser.

In reviewing the record of this sale, with reference to the objections relied upon in argument, we may observe, that if the proceeding be merely irregular and erroneous, that does not vitiate the sale. To have this effect, it must be null and void in itself.

It is not to be denied, that the proceeding is, in some respects, informal. The officer who served the warrant, and made return on the execution, before the justice, omits to name his official character. The pleading before the justice is in brief, and perfectly informal. The judgment in the county court recites the withdrawal of the pleas, and yet states the finding of a jury. Such are some of the objections relied upon by counsel. And it is further insisted, that it was not competent for the justice to try the plea of *plene administravit*, and that it could only be tried by a jury. But we are of opinion, that the objections, except the last, are merely formal, and that they do not go to the substance and validity of the record of this sale. Nor do we think that any jury was necessary, but that it was competent for the justice to determine any proper defense that might be made before him. This proceeding to subject real estate descended to heirs, to the payment of their ancestor's debt, is authorized and prescribed by the acts 1784, ch. 11; and 1822, ch. 43. They are to be taken and construed together. The personal representative may plead "fully administered," "no assets," or, "not sufficient assets."

The plea is to be tried in the forum, where it may be properly pleaded; if in the county court, (now circuit court,) it will be tried by a jury; if before a justice

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of the peace then by a justice. This trial does not conclude the heirs; for they may, as a defense to the *scire facias*, plead that the executor, or administrator, has assets, or has wasted the same.

If this defense be made, it is a matter to be tried between the heirs and the administrator or executor, and if found against the latter, will defeat the *scire facias*, and subject the administrator or executor, in his own proper estate, to the payment of the debt. But if it be not made, the administrator or executor need not appear in the proceeding by *scire facias*, and the judgment on his plea in the former proceeding, will be taken as admitted. If the heirs had pleaded that the administrator had assets, it would have become necessary to notify him to appear and defend against that plea, as the proceeding was transferred from the justice to the county court. But, otherwise, if it had originated there, as in that case, he would be already in court. As to the necessity of a jury in the present case, we may further observe, that the justice had jurisdiction of the matter before him. The defense, if true, was proper to be made, and it must be competent for the justice to determine it, as no other forum had any power over it, in the first instance. As to the informal matter in the county court judgment, stating a jury where there were no pleas, we can only say, that that should not vitiate a judgment proper in itself, and which might be valid without any jury. The heirs being summoned, appear and file pleas; these pleas, which we are to presume they were unable to prove, are withdrawn, and thereon a proper judgment, that the creditor have execution of the real estate, &c., is rendered. This must be taken as a valid judgment. It is in effect,

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a judgment *nil dicet*. We are of opinion, therefore, that the sale to Peter Jonte, the purchaser, was valid.

2. In the next place, it is insisted that the redemption from Peter Jonte, by Henry Ewing, was void, he not being a judgment creditor. Exception is also taken to the whole series of redemption; and thereon, it is argued that the sheriff's deed was illegally made to John Shelby, and had no effect to invest him with the legal title. This is not a material question in the present case.

Peter Jonte assigns his interest and orders the sheriff to make title to Henry Ewing, and so, in the whole series to John Shelby.

The judgments, sale, assignments and orders, are referred to in the sheriff's deed. This was quite sufficient to invest John Shelby with the legal title, whether the redemptions were valid or void. In *Trotter vs. Nelson*, 1 Swan's R. 13, the court say, "that as to third persons, it should be presumed from the mere recital of the assignment in the sheriff's deed, that the sheriff was authorized by the purchaser to make the deed to another, under and by virtue of the sale. It is not competent in the present case, for the defendant to make objection to the form of the assignment. The deed invests the plaintiff's lessors with the legal title, and it cannot be material to the issue whether the purchaser, who is supposed to have assigned his right, has any equitable interest in the land or not." The same principle applies to the case now before us, and renders it immaterial to make any enquiry into the validity of these redemptions.

The judgment will be reversed, and the cause remanded for a new trial.

Judgment reversed.

ROBERTS *vs.* STEWART *et als.*

PRACTICE. *Will, probate of.* A paper purporting to be the will of J. R., was produced and proved in common form in the county court. At a subsequent term, upon petition to be permitted to contest the will by a kinsman of the testator, the county court "set aside" the probate, and ordered that the matter of contest be certified to the circuit court to be tried on an issue of *deviseavit vel non*. After the issue was made up, the contestant withdrew his opposition, and the circuit court remanded the will to the county court, to be "proceeded in as in cases of uncontested wills;" whereupon, the county court ordered and adjudged that the order setting aside the probate made in the first instance be annulled, and that the probate be reinstated. *Held* that the will not being contested in the circuit court, was properly remanded to the county court; the effect of the order of the circuit court being to revive in full force the probate, the order of the county court reinstating the probate, only stated the legal effect necessarily resulting from the action of the circuit court.

This was a bill filed, upon the facts and for the purpose stated in the opinion, in the chancery court at Gainesboro'. At the July Term, 1850, Chancellor RIDLEY presiding, the bill was dismissed, and the complainant appealed.

J. S. BRIEN and QUABLES, for complainant, cited acts of 1789, ch. 23 § 1; 1835, ch. 5, § 9; 8 Yerg. 186-9; 6 Humph. 481; 7 *Ibid.*, 394.

FITE, M. M. BRIEN and McDONALD, for respondents.

TOTTEN, J., delivered the opinion of the court.

The plaintiff brings this bill to recover a distributive portion of the estate of his father, James Roberts, deceased. He alleges that his father died intestate; but that the defendants, pretending that he had left a will, have proceeded to administer and distribute the estate, consisting of land, slaves, and personal assets, in conformity to the provisions of the supposed will; that

[Roberts vs. Stewart, *et al.*]

is, amongst themselves, to the total exclusion of the plaintiff's rights. The answer of the executors and children of said James Roberts, set up a will, in relation to which the following facts appear: The *script* purporting to be James Roberts' will, is dated August 14th, 1835. The testator died, and at the October Term, 1840, of the county court of Jackson, the will was produced, and proved in common form, by the attesting witnesses.

At January Term, 1846, of said court, Geo. R. Holliman, a grand-son, and one of the next of kin, in right of his mother, of said deceased, appeared in said court, and by petition, asked to be permitted to contest said will; thereon it was ordered that the probate of common form "be set aside," and that the said *script* and matter of contest in relation thereto, be taken and certified to the circuit court to be tried on an issue *devi-savit vel non*. The parties appeared in the circuit court, where an issue was made up, and continued until March Term, 1847, when the contestant had leave to withdraw his plea, and said that he would no further contest the said *script* offered for probate, as the will of said James Roberts, deceased. Whereon, the court ordered that the will, and said proceeding in relation thereto, be remanded and certified to the county court, to be there "proceeded in as in cases of uncontested wills." The county court, at September Term, 1850, ordered and adjudged that the order made at January Term, 1846, setting aside the probate of common form, be annulled, and for nothing held; that said probate be reinstated, and be and remain in full force and effect.

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The will expressly excludes the plaintiff from any interest in the estate of the deceased, and the estate was administered in conformity to the directions, devises and bequests, contained in the will.

The Chancellor decreed a dismissal of the bill, and the plaintiff appealed to this court.

Upon this state of facts, it is argued for the plaintiff, that he is entitled to an interest as of an intestate estate, because there is no probate of the supposed will; that the probate made in 1840 was set aside in 1846; that there was no probate in the circuit court; nor again, in the county court, when remanded there to be proceeded in as in cases of uncontested wills.

It is true, that unless there be a subsisting and valid probate of the will, under which the defendants claim their title does not appear; and that is the only question to be considered in the present case.

Now, a script is equally well established as a will, whether the probate be in common form or solemn form. It may be proved in solemn form in the first instance; but where there has been a probate in common form, in that case, the probate in solemn form is no more than a re-examination and confirmation of the former probate. And so, if upon a trial of the issue *devisavit vel non*, in solemn form, it be found against the script, it results in a revocation of the former probate of the common form, and the same is thereby, in effect, set aside and annulled. We take this to be the nature and legal effect of the proceeding, considered at common law, as modified and changed by our statutes.

Now, the probate in common form establishes the will for every purpose, except that it is not conclusive

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as to the persons interested in the estate, in case there were an intestacy.

The probate in solemn form is merely cumulative in its nature; is conclusive as to every person interested in the estate, and precludes any future contest as to the validity of the will. There can be no other difference in the legal effect; and this is owing to a difference in the manner of proceeding in the two cases. For, the probate in common form, being *ex parte* in its nature, without notice to persons interested in the estate, it must follow that they are not concluded by it; but may contest the will, if they have cause to do so.

The nature of this proceeding is stated in *Cornwell vs. Cornwell*, 11 Humph., 485, where it is said to be a suit instituted by petition, asking the court to set aside the probate of common form and to transfer the will to the circuit court to be proved in solemn form, on the issue *devisavit vel non*.

Now, if the petition make a proper case, the usual order is, that the former probate be recalled, or, as in the present case, set aside; and that the script be sent to the circuit court, where the issue is to be made up and tried.

The order, in terms, is, "that the probate be set aside." But has the county court any power to set aside and annul its order and judgment made at a former term? We cannot see that it has; and if it had, there can be no reason for its exercise. For it cannot make the second probate of a will, upon an issue *devisavit vel non*. That must be sent to the circuit court to be tried by a jury. If they pronounce against the will upon a trial in solemn form, the effect is to annul and revoke the former probate; but, if otherwise, the effect is merely to affirm

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it. Whether the former probate shall be annulled and revoked or not, depends upon the result of the second probate; and that is not to be had in the same, but in a different forum. Our system in this respect, is different from that of England, where both of the forms of probate are in the same court, and according to the course of the civil law. The legal effect of the order to set aside the former probate, was merely to suspend it, as to any action or rights that might be dependent upon it, until after the trial of the issue sent to the circuit court, or until some final action in the premises in that court.

In the present case the issue was abandoned, and the will not being contested, was properly remanded to the county court. The effect of the circuit court order was, to revive in full force the former probate, which was no longer contested. The order of the county court made thereon, stating the former probate to be and remain in full force, only stated the legal effect that must necessarily result from the proceeding which then appeared to have taken place. It was proper to notice on its records, that the proceeding which had been instituted, was abandoned; that the will was not contested, and that the probate in that court remained in full force and effect. It would have been a mere idle ceremony to repeat the same probate in the same form; if indeed it might then be possible to do so in every case where, from lapse of time and other causes, it might not be in the power of the executor to produce witnesses who can prove the will.

The chancellor's decree dismissing the bill, will be affirmed.

Decree affirmed.

BAILEY vs. MASSEY.

TRESPASS QUARE CLAUSUM FREGIT. *Adverse possession.* Where parties have conveyances covering the same lands, which neither has in actual possession, if he who has the younger title enter upon the lands and cuts the timber, and with the timber so cut erects houses and fences by means whereof he becomes actually possessed of the land, the other party, having the older and better title, may maintain an action of trespass for the injuries done before the actual possession is taken.

This was an action of trespass *quare clausum fregit* tried in the circuit court of Smith county at its March Term, 1852, QUARLES, Judge, presiding. There was judgment for the defendant and the plaintiff appealed in error.

FITE, for plaintiff in error, insisted that an action of trespass *quare clausum fregit* is not barred by the simple fact that the defendant, after the commission of the trespass, and before the commencement of the suit, has acquired the actual adverse possession of the land on which the trespass was committed.

MOORE, for defendant in error, cited *Polk vs. Henderson*, 9 Yerg., 311; *Blacock vs. Tompkins*, Meigs' Rep., 317, 328.

McKINNEY, J., delivered the opinion of the court.

This was an action of trespass, *quare clausum fregit*, for cutting down certain timber trees, &c.

The place where the alleged trespass was committed, was claimed by both plaintiff and defendant, and was covered by the title deeds of both parties. Prior to the alleged trespass, complained of in the present action, there was no *actual* possession of the part covered by both titles, being about twenty-two acres.

[Bailey vs. Massey.]

The proof shows that the defendant entered upon, and built a house and made an enclosure within the limits of said twenty-two acres, and that he was residing upon, and adversely holding the same, at the commencement of this action. And the question is, whether the plaintiff, assuming for the present that his was the elder and better title, can maintain this action to recover damages for the timber cut down by the defendant, upon said twenty-two acres, from time to time, before erecting the building and enclosure, and taking actual possession of the same. It is argued that he cannot, and so the circuit judge instructed the jury.

This instruction, we think, was erroneous.

It is unquestionably true, that to maintain the action of trespass, *quare clausum fregit*, the plaintiff must, at the time the trespass was committed, have had either an actual possession of the premises, or a constructive possession in respect of the right being actually vested in him. 4 Kent's Com., 120; *Polk vs. Henderson*, 9 Yerg. R., 310.

The case of *Polk vs. Henderson*, and other decisions of this court, establish the doctrine, that the legal owner may, in the absence of an adverse possession, maintain trespass *quare clausum fregit*, upon his constructive possession of the premises, against an actual trespassor; but that he cannot maintain such action against a person in the actual adverse possession of the premises, at the time the alleged trespass was committed.

It is well settled, that if one in possession be disseised, he may maintain trespass *quare clausum fregit* against the disseisor for the act of disseisin itself, because, at the time of the disseisin, he was in possession; but for any injury after the disseisin he cannot support this action,

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until after he has regained the possession, and then he may maintain trespass for all intermediate damage. (1 Chitty's Pl., 177, 178; 4 Kent's Com. 119, 120.) Upon re-entry, the law supposes the freehold to have all the time continued in him; and he is restored to his possession *ab initio*. *Ib.*

If, then, the person disseised, may, while out of possession, maintain this action against the disseisor, in the actual adverse possession, for the injury occasioned by the act of disseisin, much more, it would seem, may he maintain such action for any casual trespass upon the premises, not in itself amounting to a disseisin. A mere entry and cutting trees standing upon the premises, constitutes neither a disseisin, nor actual adverse possession. Such acts, however frequently repeated, would confer upon the wrong-doer, no such possession as would entitle the rightful owner to maintain an action of ejectment against him; nor would it be such possession as the former could avail himself of under the statute of limitations.

Casual trespasses upon the premises, preceding disseisin, and actual adverse possession taken by the wrong-doer, are clearly distinguishable from injuries to the freehold, committed after the inception of such adverse possession. For the former, both in reason and upon authority, the action of trespass may be supported by the party disseised, before being restored to the possession, and during the continuance of the wrong-doer's adverse possession; because such acts of themselves, working no disseisin, the possession, actual or constructive, was still in the rightful owner, at the time of their commission.

But, as to injuries committed after the wrong-doer has acquired actual adverse possession, the law is wholly

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different. For such injuries, trespass cannot be supported until after the possession is regained.

Judgment reversed.

WINNINGHAM, *adm'r.* vs. CROUCH.

FORCIBLE ENTRY AND DETAINER. *Parties. Administrator.* An administrator may properly bring an action of forcible entry and detainer, in his representative character, when the cause of action has accrued in the lifetime of his intestate and the estate of his intestate was a chattel interest.

AMENDMENT. *Parties.* When the words "administrator, &c." may be regarded as descriptive of the person merely, process in which they are so used may be amended by striking them out.

The judgment in this case was rendered at the February Term, 1852, of the circuit for Overton, QUARLES, Judge, presiding. The plaintiff appealed in error.

S. TURNEY, for the plaintiff in error.

SWOPE, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action for "unlawful entry and detainer," commenced before three justices of the peace.

In the warrant, the complaint is stated to have been made by Adam Winningham, administrator of the estate of Thomas Payne, deceased. The plaintiff recovered by the judgment of the justices and an appeal was prosecuted

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by the defendant to the circuit court. In that court the defendant moved to quash the warrant and the motion was sustained and the warrant quashed. The plaintiff thereupon moved for leave to amend the warrant, which motion was refused.

The record is silent as to the ground upon which the warrant was quashed. It is said, however, to have been for the reason, that the plaintiff sued as administrator of Payne; and that, by law, an action for unlawful entry and detainer cannot be maintained by him in his representative capacity. This is by no means universally true. If the estate be merely a chattel interest, as a lease, or term for years, it is regarded as personal estate, and is governed and descendible in the same manner, and does not go to the heir at law, but to the personal representative; consequently for a forcible or unlawful entry and detainer, if the cause of action accrued in the lifetime of the intestate, the administrator should sue in his representative capacity; and if the cause of action accrued after the death of the intestate, he might perhaps sue in his representative capacity or in his own name.

In the present case, there is nothing in the record, showing the nature or quantity of the estate. The objection, therefore, could not properly be taken by motion to quash, admitting the estate were a freehold which descended to the heir at law; this was matter of defense upon the trial, if not previously taken advantage of, by plea in the proper mode. The motion to quash must be founded upon some matter apparent upon the face of the record. The court could not be informed, in the present case, by any thing upon the record, whether the estate in question was a freehold which descended to the

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heir or merely a chattel real which passed to the administrator.

But, admitting the motion to quash to have been properly allowed, we think the motion to amend ought to have been allowed. We have held that where a suit was brought in the name of one for the use of another, it was allowable to amend by striking out the name of the nominal plaintiff. Regarding the words "administrator of the estate of Thomas Payne, deceased," as descriptive of the person merely, and this the motion for leave to amend assumes, we see no objection to allowing the motion; and in refusing it, we think there is error.

Judgment reversed.

WROE and wife vs. GREER.

PRACTICE. *Justice of the Peace. Plea in abatement.* The fact that the justice of the peace who tried a cause was incompetent because of his relationship to one of the parties, is not legitimate matter for a plea in abatement in the circuit court after the cause has been removed into court by an appeal.

The judgment in this case was rendered, as stated in the opinion, at the August Term, 1851, of the circuit court for DeKalb county, TURNER, Judge, presiding.

COLMES & CANTRELL, for plaintiff in error.

M. M. BRIEN, McWHIRTER and QUARLES, for defendant in error.

[Wroe and wife vs. Greer.]

TOTTEN, J., delivered the opinion of the court.

The action is unlawful detainer, to recover the possession of a house and tract of land. There was judgment for the plaintiffs before the justices of the peace, and defendant appealed to the circuit court, where he filed his plea in abatement, alleging that Justice Williams, who issued the writ, and sat with two other justices on the trial, was incompetent to try the case, because he was cousin to defendant's wife; and that defendant did not waive this objection at the trial. A demurer to the plea was overruled, and judgment rendered for defendant, from which the plaintiff has appealed in error to this court.

The practice adopted in the case, was irregular, and the judgment erroneous. The objection for incompetency of the justice, should have been taken before him, and before a trial upon the merits; if not so taken, the objection is to be considered as waived. For a party may waive, and preclude himself from taking any objection to a decision on account of the judge being related to one of the parties; and the waiver may be express, or by necessary implication. 3 Bl. Com., 299, and notes; *Matthew vs. Ollertin*, 4 Mod., 226.

But here the objection, if it were not waived, had ceased to have any application to the case. The appeal to the circuit court had the effect to supersede the judgment of the justices, and the case was now to be tried *de novo*, upon its merits, before a competent court. It was the same as if the case had been originally instituted, as it might have been, in the circuit court. The question, whether the competency of the justice had been waived, while the case was before him, had ceased

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to be of any utility or effect in the case, now that it was no longer before him, and was again to be tried upon its original facts, in the same manner as if there had been no former trial.

The judgment is reversed, and the cause remanded to the circuit court to be proceeded in.

Judgment reversed.

WARD, adm'r., &c. vs. SAUNDERS et als.

CONSTRUCTION OF WRITINGS. Will. The testatrix made the following devise:

"I will that all my estate, both real and personal, which may come to the hands of my executors for the use and benefit of my daughters, Levisa Saunders, Catharine Campbell and Celia Stone, remain in the hands of my executors, in trust for my said daughters during their natural lives and to the heirs of their bodies forever." To which will there was this codicil: "In pursuance of my last will and testament, it is my desire that my young negroes already devised by will be divided as follows, to wit: To my daughter Levisa Saunders and the heirs of her body, negro girl Polly," &c. Held that the clause of the will above quoted fixed and controlled the rights of Levisa Saunders and the other legatees and that the codicil only designated what particular property each legatee should take under the restrictions and limitations of the will, and that Levisa Saunders took only a life estate in the property.

Mary H. Bowen's will contained the clause and codicil quoted in the opinion. After the death of the testatrix, Levisa Saunders, one of the legatees, died, having made her last will and testament in which she disposes of the property bequeathed to her in the will of Mary H. Bowen. This bill was filed by the complainant as administrator, with the will annexed of Levisa Saunders, in the chancery court at Franklin for a construction of the

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will of Mary H. Bowen as to the extent and character of the estate devised to Levisa Saunders, whether absolute or for life only. At the July Term, 1852, Chancellor RIDLEY decreed that Levisa Saunders was vested with an absolute estate. From this decree there was an appeal.

CARUTHERS and READY, for complainant.

STOKES, MARTIN and GUILD, for respondent.

HOUSTON, Special J., delivered the opinion of the court.

The question in this case arises upon the construction to be given to the sixth clause of the will of Mary H. Bowen, in connection with the codicil to the will. The clause is in these words: "I will that all my estate, both real and personal, that may come to the hands of my executors for the use and benefit of my daughters, Levisa Saunders, Catharine Campbell, and Celia Stone, remain in the hands of my executors, in trust for my said daughters, during their natural lives, and to the heirs of their bodies forever." The words of the codicil are as follows: "In pursuance of my last will and testament, it is my will and desire that my young negroes already devised by will, be divided as follows, to-wit: To my daughter Levisa Saunders, and the heirs of her body, negro girl Polly," &c.

It is conceded in the argument, that if the 6th clause of the will stood alone without the codicil, the case would be embraced by the principles laid down in the case of *Suttle vs. Suttle*, 10 Humph. 474, and that Levisa Saunders would only take a life estate in the property. But it is argued that the codicil revokes this clause, and gives

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the slave to Levisa Saunders and the heirs of her body, bringing the case within the rule in Shelly's case, and giving to Levisa Saunders the absolute estate in the property. This is not the proper construction. We think the sixth clause of the will fixes and controls the right of Levisa Saunders, and the other legatees, to the property mentioned in the will; and that the codicil only designates what particular property each legatee should take under the restrictions and limitations of the will, and that Levisa Saunders took a life estate only in the property. We therefore reverse the decree of the chancellor, and order a decree in conformity with this opinion.

McMURRY vs. MILAN.

CERTIORARI AND SUPERSEDEAS. *When available as a remedy.* The remedy by writs of *certiorari* and *supersedeas*, can be resorted to as a substitute for an appeal, only when it is stated in the petition for the writs, that an appeal has been defeated either by the oppressive or erroneous act of the court, or justice of the peace; by the wilful or negligent act of the clerk; by the contrivance or procurement of the adverse party; by inevitable accident; or, by the blameless misfortune of the petitioner. Hence, it is not a sufficient reason for not appealing from the judgment of a justice of the peace, that the petitioner did not know, or suspect, until the time within which he might have appealed had expired, that the paper upon which he was sued was a forgery.

The judgment in this case, from which the defendant appealed in error, was rendered at the May Term, 1852, of the circuit court for Davidson county, **MANEY**, Judge, presiding.

TRIMBLE and **REID**, for plaintiff in error.

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EWING & COOPER and DEMOSS, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

This is an appeal from the judgment of the circuit court of Davidson county, dismissing the writs of *certiorari* and *supersedeas*, previously granted to the plaintiffs.

The petitioner states, that on the 18th February, 1852, judgment was obtained against him and his son-in-law, C. L. Freeman, before R. W. Green, Esq., in the city of Nashville, six miles from his residence, for two hundred and one dollars, upon which execution has been issued. The warrant was served upon him, but he did not attend upon the day of the trial, supposing it was all right, as he had signed several notes as security for said Freeman, in the month of December, before; he had been warranted in three or four cases of the same kind, and perhaps, in all, some twenty cases. He had great confidence in his son-in-law, and suspected no wrong until about the 17th of March, when his suspicions became aroused; and, upon investigation then made, he found that his name had been forged in this, and many other cases; making, in the aggregate, an amount that would ruin him to pay.

On the 9th of April, 1852, he filed his petition for writs of *certiorari* and *supersedeas*, in this and other cases. He did not appeal, "because he did not know of the existence of the forgery, until the time within which he could appeal by law had elapsed."

Is this, taken in connection with the other facts stated, his age, confidence in Freeman, his character in the community, and that he had signed sundry notes as his security, good and sufficient reason under the laws of this

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State, for not resorting to the ordinary remedy by appeal? This is certainly a strong case of merit, and relief ought to be extended, if it can be done without a violation of the settled rules of law. And in a case of so much hardship and such strong merits, we would be inclined to strain those rules, if it were not for the mischievous effect of such a precedent, and the importance of adhering to settled principles. It is true that this writ is mentioned in our Constitution, Art. VI., § 10, and its benefit secured to the citizens. But it can only be issued "on *sufficient cause shown, supported by oath or affirmation.*" It is left with the legislature or the courts, to determine what shall be "sufficient cause." It was decided in this State, as early as 1808, in *Henderson vs. Lackey*, 2 Ten. Rep. 110, that there were but two grounds for dismissing this writ. 1. *Not showing satisfactorily why the ordinary remedy by appeal was not resorted to.* 2. The want of merits on the face of the petition. The "sufficient cause" required by the Constitution does not exist, unless good and sufficient reason for not appealing is given. These grounds have been adhered to by our courts ever since. What constitutes good cause for failing to appeal, has been well settled by a series of adjudications. And the question here is, whether the excuse assigned in this petition, comes up to the requirements of the law, as it is thus settled in this State.

The remedy by certiorari cannot be resorted to as a substitute for the appeal, except a case is made out in the petition that will shew the appeal was defeated.

1. By the oppressive or erroneous act of the court or justice.
2. By the wilful or negligent act of the clerk.

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3. By the contrivance or procurement of the adverse party.

4. By inevitable accident.

5. By the blameless misfortune of the petitioner. 1 Meig's Dig. p. 164.

This accurate and discriminating classification of the grounds of excuse for failing to appeal, is well sustained by the following reported cases, decided by the supreme court of this State: 2 Ten. 110; 4 Hay. 100; 2 Ten. 108; 7 Yerg. 300; 2 Ten. 179; 5 Yerg. 108; 3 Humph. 148; 10 Yerg. 121; 2 Humph. 32, 34; 3 Humph. 137, 145; 8 Yerg. 165; 5 Humph. 46.

In none of these cases is a principle to be found, which will sanction the allowance of a certiorari as a substitute for an appeal, in a case like this.

Mr. McMurry was legally notified of the time and place of trial. It was his duty, if he desired to make any defense, to meet the plaintiff before the forum to which he was summoned, and, if not content with the judgment rendered, to appeal to a higher tribunal. It will not do to say that he supposed all was right, and therefore omitted to attend to his case. He has had "his day in court," and if he neglected to attend to his interest, he must abide the consequences. If he is injured, it is his misfortune, but not a "blameless misfortune."

Men are required to be vigilant in attention to their rights. But he pleads that he was ignorant of the fact that the note on which he was sued was forged. So he would have remained, if he had never investigated the matter.

It was his duty to attend to this on the day of trial. That was the time fixed on by law. Perhaps if he had done his duty on that day, by going forward, and by

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examination, ascertained and relied upon the existence of forgery in the case, the plaintiff in that suit would have been able to secure himself out of Freeman; which opportunity has been lost by the delay. The fact also of his taking no steps, from the discovery of the forgery on the 17th March, till the 9th of April, looks very much like his object was, to give some advantages to his son-in-law, to the injury of his creditors. But, let this be as it may, that sound and necessary policy of the law, which requires every man to attend to his suits at a designated time, and that there should be an end to litigation, forbids that a judgment should be disturbed, and the rights of parties unsettled, under such circumstances as surround this case.

The judgment below is affirmed.

BEASLEY vs. BRADLEY et al.

PRACTICE. Verdict. Witness. When it clearly appears, during the progress of a trial that the plaintiff has resorted to the fraudulent artifice of joining as defendant in the action one who would be an important witness for another defendant for the purpose of preventing his examination as a witness, the court may direct a verdict to be rendered for that defendant and permit him to be introduced as a witness in behalf of the other defendant.

ACTION. Proceedings before Justice of the Peace. While it is true that the court will not regard the mere forms of proceedings before justices of the peace, yet the two classes of action, *ex delicto* and *ex contractu* cannot be blended or united together, and a recovery cannot be had under the one form if the action be of the other.

At the March Term, 1852, of the circuit court of Smith county, QUARLES, Judge, presiding, there was judg-

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ment rendered in this case for the defendants and the plaintiff appealed in error.

FITE, for plaintiff in error.

M. M. BRIEN, MOORE and McCLAIN, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

This action was commenced before a justice of the peace, and the defendants were summoned to answer the plaintiff "of a plea of trespass on the case, for disposing of one hogshead of tobacco, contrary to the order and direction of the plaintiff, it being the property of the plaintiff, to his damage fifty dollars." Such is the nature of the action as stated in the warrant.

The tobacco was assigned to Bradley to be shipped and sold on account and for the use of the plaintiff. It was shipped to and sold at Nashville and produced the nett sum of only eighteen dollars, it being partly injured by the frost, and tobacco being low in the market at the time it was sold. The plaintiff asserts that he ordered Bradley to cause the tobacco to be sold at Nashville, if it would bring five dollars per hundred; if not, to ship it to New Orleans and sell it for what it would bring; on the contrary, Bradley asserts that the order was, to sell it at Nashville for what it would bring. Bradley shipped the tobacco by the agency of Cage, the owner of the warehouse where it was stored on the river. Cage merely caused it to be shipped, in pursuance of directions from Bradley, and had no other agency in the matter.

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At the close of the evidence on the part of the plaintiff, the court directed a verdict to be found in favor of Cage, and he was examined for the other defendant as a witness. The court instructed the jury, that in this action the plaintiff could not recover the eighteen dollars, the proceeds of the sale at Nashville, to which exception was taken. No exception was taken to the balance of the instructions.

The judgment was for defendant, and plaintiff has appealed in error to this court.

First. It is insisted that the court erred in directing a verdict in favor of Cage. We do not think so. The plaintiff having closed his evidence in chief, it then appeared that there was no evidence against the defendant, Cage, and that he was improperly joined in the action to exclude his testimony for the other defendant. It was a fraudulent artifice, designed to take from Bradley the benefit of Cage's testimony, who was a material witness to prove the instructions given by the plaintiff in reference to the sale of the tobacco. For there was no evidence whatever, against him. It is true, that as agent for Bradley, he shipped the tobacco; but of that no complaint can be made, as it is conceded that Bradley was to ship the tobacco to Nashville. The ground of complaint is, that he caused it to be sold for a less sum than the plaintiff had ordered, and with the sale Cage had no connexion whatever. We think the action of the court in this respect was very proper. 1 Greenl. Ev., § 358; 14 Johns., 122; 15 Johns., 223; *Child vs. Chamberlain*, 6 C. & P., 213.

Second. It is insisted that the court erred in the instruction to the jury, that in the present action the proceeds of the sale could not be recovered.

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The action is in *tort*, to recover damages for a sale made contrary to the orders of the plaintiff; and this proceeds upon the idea of a wrongful conversion of the tobacco, contrary to the contract of bailment. The plaintiff seeks to recover, not the nett proceeds of the sale, to which he was entitled under the contract, but a greater sum, in damages, because the contract was not complied with.

In any event, he is entitled to the nett proceeds, under the contract. But if he fail in his action for the *tort* and yet be allowed to recover what is due him on his *contract*, which sum is admitted by defendant to be due him, then he throws upon defendant the costs of a suit which he himself should pay.

It appears in this case that defendant offered to pay the nett proceeds of the sale, and no suit was necessary for its recovery. If it had been necessary it must be upon the contract of bailment.

It is true, that the court will not regard the mere form of proceedings before justices of the peace, if they be substantially correct, so as to attain the justice of the case. But the two classes of actions arising *ex delicto* and *ex contractu*, cannot be united and blended together, without producing such confusion as must result in injustice and injury to the one party or the other.

Such would be the case in the present suit if the practice contended for were allowed.

Let the judgment be affirmed.

TOPP *vs.* THE BRANCH OF THE BANK OF ALABAMA AT
MOBILE, *for the use of Mallory.*

JUDGMENT. *Rendered in another State.* A judgment rendered in one State in pursuance of the laws of that State, is to be regarded as absolutely binding upon the parties thereto, in every other State, until it is either set aside by the tribunal rendering it, or is reversed upon error.

SAME. *Satisfaction of. Negotiable paper.* If the holder of negotiable paper, who has obtained separate judgments against each, the drawer and endorser, receive payment in discharge of the judgment against the endorser, it is, in law, a satisfaction of the judgment against the drawer, and an assignment of the judgment against the drawer to the endorser who has thus been discharged, communicates to the endorser no right to have satisfaction of the judgment.

This was an action of debt upon the facts stated in the opinion, in the circuit court of Davidson county. At the September Term, 1852, BAXTER, Judge, presiding, there was judgment for the plaintiff, and the defendant appealed in error.

WILLIAM THOMPSON, for Plaintiff in error.

EWING & COOPER, for defendants in error, argued: The question whether an endorser against whom there is a separate judgment, can take an assignment of the judgment against the principal debtor, is an entirely different question from the ordinary one as to whether the payment by a surety of a joint judgment is a satisfaction. We admit that this latter question is settled affirmatively in cases reported in 3d, 4th and 5th Humph. But in the case in 3 Humph., *Green vs. Green*, our court held that a surety might pay a joint judgment and still have an assignment of the lien retained in the deed, which is itself but an incident or attendant of the note on which the judgment was founded; and Mr. Meigs, in his Note, (see Dig. p. 993,) says that the tendency is to place our

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doctrine of the civil law, which considers every satisfaction by a surety or endorser as an assignment.

However this may be, the case of an endorser in a separate judgment, is different. See 10 John. Rep., *Clason vs. Morris*, 549, which has always been considered a leading case on this subject. We also refer to 3 Ala. Rep. 302; 5 Harr & Johnson, 234; 6 Paige 32.

McKINNEY, J., delivered the opinion of the court.

This was an action of debt in the circuit court of Davidson, brought by the Bank against the plaintiff in error, founded on the record of a judgment of the circuit court of Mobile county, in the State of Alabama, rendered on motion in favor of said bank, against the plaintiff in error, on the 6th of December, 1841, for seven hundred and seventy-eight dollars and fifty-three cents. Said judgment is founded upon a promissory note as negotiated to said bank, made by the plaintiff in error, and endorsed by S. S. Webb and F. B. Shepherd.

The proceeding in this case is in pursuance of the 7th section of the statute establishing "The Branch of the Bank of the State of Alabama at Mobile," which enacts that "if any person or persons shall be indebted to said branch bank, as maker or endorser of any note, bill or bond, expressly made payable and negotiable at said branch bank, and shall delay payment thereof, it shall be lawful for the President of the branch bank, after having given thirty days notice thereof, to move the circuit or county court of the county of Mobile, on producing to said court before which the motion is made, the certificate of the President of the branch bank, that the debt is really and *bona fide* the property of said branch

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bank for judgment, &c. See Clay's Alabama Dig., p. 99.

The judgment on its face shows an exact compliance in every respect, with the requirements of the foregoing section.

It appears that at the same time that the above mentioned judgment was rendered against the plaintiff in error, as maker of said note, a similar judgment was rendered thereon on motion, against F. B. Shepherd, as last endorser. And it further appears from the answer of the proper officer of said bank, to a bill of discovery filed in the progress of this suit, and likewise from the answer of Shepherd and Mallory to said bill, that the before mentioned judgment against said Shepherd, was "paid and discharged" by him to said bank, on the 15th of January, 1842, as is shown by the books of the bank.

It furthermore appears from the books of the bank, that on the 8th of December, 1845, an order was made by the board of directors, directing the President and Cashier of said bank, to transfer and assign the foregoing judgment against Topp to said Shepherd; and on the following day, 9th December, 1845, the assignment was accordingly made. And sometime in 1846, Shepherd transferred said judgment to George W. Mallory, for whose use this suit was brought on the 17th of March, 1848.

The defendant pleaded *nul teil record*, and several other special pleas, in some of which it is averred in general terms merely, that the circuit court of Mobile county, Alabama, had no jurisdiction to render said judgment, but for what reasons is not alleged; and in others it is averred, in the face of an express recital in the judgment, that notice of the motion, as required by the statute, was not given to the defendant.

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The plea of payment was afterwards put in, and issue was taken thereon; upon which the jury found that a balance of said judgment of five hundred and eight dollars and forty cents remained unpaid, for which judgment was rendered; to reverse which, an appeal in error has been prosecuted to this court.

The several special pleas of the defendant are perhaps all defective, in form as well as substance, and need not be noticed. First, because, upon another distinct ground, the present action must fail; and secondly, for the more conclusive reason, that the defendant cannot be permitted to avail himself of the matters averred in said pleas.

The defendant in this case, at the time of the rendition of said judgment, was a citizen of Alabama, had his domicile there, and consequently was bound by the laws of that State; and the proceedings and judgment in the case are shown, upon their face, to have been in strict conformity to the law.

We do not of course mean to controvert the doctrine now so well established, that the faith and credit given by the Constitution of the United States, to the judgment of a State court, in the judicial tribunals of another State, does not preclude an inquiry, in all cases proper for such inquiry, into the jurisdiction of the court in which the original judgment was rendered, over the parties, or over the subject matter. The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them, as evidence; Story's Com. on Const., ch. 29, §§ 1297 to 1307. When declared

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on as an evidence of debt in the court of another State, the jurisdiction of the court rendering such judgment may be put in issue, but not the merits of the judgment. But it is a well settled principle of law, that the proceedings of a court of general jurisdiction, cannot be questioned collaterally, and are absolutely binding on the parties, until set aside by the tribunal in which they may have taken place, or regularly reversed on error. This principle, we think, applies to the present case. The defendant was a citizen of the State in which the judgment was rendered, and bound by the laws thereof. It is certainly within the competence of each State to regulate the mode of bringing its own citizens before its courts, and also to regulate the effect of the proceedings and judgments of such courts, so far at least, as respects its own citizens; although its regulations in these respects can have no extra territorial operation. We are of opinion, therefore, that the defendant cannot collaterally impeach the judgment in question for want of jurisdiction, on the ground that notice was not given, and that the judgment being regular and in strict conformity to the law of Alabama, is, in respect to the matter of notice, and as to all other matters, binding upon him. See *American Leading Cases*, Vol. 2, 724, et seq., where the authorities are collected.

But without pursuing the discussion upon this point any further, we come to consider the effect at law of the discharge by Shepherd of the separate judgment rendered against him in favor of the bank, upon the same identical note on which the judgment in question was founded. Was it, in the view of a court of law, a satisfaction and discharge of the judgment against the plaintiff in error? We think it was. The bank had the

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unquestionable right to several judgments against the maker and endorser of the note, but it could have only one satisfaction of the debt, and the discharge of either judgment operated, at law, as a satisfaction of the debt, and a discharge of the other judgment.

We do not controvert, but admit the well established doctrine in equity, that a surety, on payment of the debt of his principal, is entitled to stand in the place of the creditor, and is regarded as substituted to all the rights, remedies and securities of the creditor, and entitled to enforce all the creditor's liens, priorities, and means of payment, as against the principal. This equitable right of the surety, as observed by chancellor Kent, stands not upon contract, but upon principles of natural justice. The payment by the surety is held, in equity, to operate merely as an assignment, and not as an extinguishment either of the debt or of the remedy. In favor of the surety, the debt and all its incidents and remedies are considered as still subsisting. Upon payment of a judgment, the surety is entitled to be subrogated, as against the principal, to the benefit of its lien, as it existed in favor of the judgment creditor. And it makes no difference whether the judgment was against the principal and surety jointly, or whether there were several judgments. 4 Johns. Ch. Rep. 123; 6 Paige, 254; 10 Johns. Rep. 524.

This doctrine of courts of equity considers the debt or judgment, though extinguished at law, as preserved and kept alive for the indemnity of the surety, who has paid the debt. And it is conceded, that even at law, the legal consequence of extinguishments may be avoided. It has been so held by this court, repeatedly. See 2 Meig's Dig., 990, to 993, where the cases are

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collected. But this proceeds upon the ground of contract with the creditor. The money is paid in such case, not in satisfaction, but by way of purchase of the judgment, and the judgment is not thereby extinguished, but remains in full force, and with its lien and other legal incidents and consequences, is transferred by assignment, to the surety, as purchaser.

But in the case under consideration, the money was paid by Shepherd to the Bank, in discharge of the judgments against himself, as endorser, and not as a purchaser or assignee of the judgment against Topp, and thereby the judgment against the latter became satisfied and extinguished. There remained in the Bank no longer any interest in said judgment, against Topp, except merely as to the costs thereof; nothing else could be assigned; nothing else to which Shepherd could be subrogated. 4 Humph., 319; 5 Humph., 298. It results, therefore, that the judgment must be reversed, and the cause remanded for a new trial.

KIMBROW for the use of *Bugg vs. HAMILTON adm'r.*

DEEDS. *Date of. Estoppel.* When a party has deliberately and intentionally inserted in a deed a false date, expressly with a view to the accomplishment of a particular purpose, he is estopped to aver or prove a different date from that set forth on the face of the instrument.

SLAVERY. *Adverse possession of a slave in some other person than the vendor at the time of the sale.* The sale of a slave is not vitiated by the fact, that at the time of the sale, the possession thereof is not in the vendor, but in the adverse possession of some other person.

[Kimbrow, for the use of Bugg vs. Hamilton, adm'r.]

This was an action of assumpsit, upon the facts stated in the opinion, instituted in the circuit court of Davidson county, by Kimbro for the use of John and Jesse Bugg against Hamilton, adm'r., of Benj. Bugg. At the May Term, 1852, MANEY, Judge, presiding, there was judgment for the defendant, and plaintiff appealed in error.

DUNNICK, for plaintiff in error.

EWING & COOPER, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

From the proof in this case, it appears that in the year 1846, John Kimbro, the nominal plaintiff, placed a negro girl, owned by him, in the possession of his his step-son, Benjamin Bugg, (defendant's intestate,) as a loan, to be retained by said Bugg, until Christmas following. The slave continued in the possession of Benjamin Bugg until some time in 1847, when he and John Bugg, (one of the beneficiaries in the present action,) sold her to one Maddux, for three hundred and twenty-five dollars, and jointly executed a bill of sale. Some time after said sale, Benjamin Bugg died, and after his death, in 1848, said Kimbro and wife, executed a bill of sale for said slave, to John Bugg, Jesse Bugg, and said Benjamin Bugg; the slave then being in the *adverse possession* of Maddux, Benjamin Bugg being dead. It seems from the proof, that the intention of Kimbro and wife had been, to give said slave jointly to the three Buggs, who were the children of Mrs. Kimbro by a former husband; and the purpose of the bill of sale executed by them, was to enable

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John and Jesse Bugg, for whose use this suit is brought, to recover from the estate of Benjamin Bugg, (who, as is alleged, received the money from Maddux,) their equal share of the price of said slave. With a view to effect this purpose, a false date was inserted in the bill of sale, (23rd November, 1846,) a period anterior to the conversion of the slave by Benjamin Bugg, and the bill of sale having been, in fact, executed in 1848, as before stated. On the trial in the circuit court, the plaintiff produced and read to the jury, said bill of sale, executed by himself and wife, with the certificates of probate, and registration of the same; and the foregoing was all the evidence in the cause.

The defendant, by his counsel, objected to the proof, showing that the bill of sale was antedated: it was admitted, however; but, in the charge to the jury, the court held that it was inadmissible, and that the plaintiff was not permitted to show that his own bill of sale had been antedated. This is the only exception taken to the charge. The verdict was for the defendant, and a new trial being refused, an appeal in error was prosecuted to this court.

It is insisted that the court erred in holding that it was not allowable for the plaintiff, under the circumstances of this case, to show that the bill of sale was, in fact, executed at a period subsequent to that at which it bore date.

The argument assumes, that the slave being in the adverse possession of Maddux, at the time the bill of sale was, in fact, executed by Kimbro, nothing remained in the latter but a bare right to sue, and recover possession of the slave; and that, as by the maxim of the common law, a *chose in action* can not be assigned or

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transferred, so as to give the assignee a right to sue in his own name, this action was properly and necessarily brought in the name of Kimbro, who had a right to maintain the same; and that, as the date is no part of a deed, and is not maintained, the plaintiff was not estopped from showing that the bill of sale was executed on a different day from that of its date.

In the view in which this case presents itself to our minds, we are at a loss to perceive the relevancy or importance of the proof rejected by the court. But were it otherwise, in rejecting it there was no error. The general doctrine insisted upon, in respect to the date of a deed, or other instrument, is unquestionably correct, but it is not applicable to a case like the present. Here, the plaintiffs deliberately and intentionally gave the bill of sale a false date, expressly with a view to the accomplishment of a particular purpose; and that failing, he must abide the consequence of his own act. However it may be as regards others, he is estopped to aver or prove a different date from that set forth on the face of the instrument. 1 Greenleaf's Rep., 343; 11 Mass. Rep., 282; 4 Phillips on Ev., p. 1448.

But how was the evidence of any importance? The bill of sale was either operative to divest the plaintiff of all interest and right of action, or it was of no effect whatever. If it was a mere nullity, as the argument assumes, then Kimbro's interest, whatever it was, remained in him, as it was before, wholly unaffected by the execution thereof. And if he were entitled to maintain an action for the value of the slave, or the money for which she was sold, there was no necessity for, or propriety in, his introducing the supposed void conveyance; and if it had been offered by the defendant for the purpose of

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defeating the action, the plaintiff, (if it was void in law,) might have avoided it upon proof of the facts which rendered it inoperative.

But in the present state of the law upon this subject, in Tennessee, we are not prepared to admit the correctness of the conclusion, that the bill of sale made by Kimbro was inoperative to divest and transfer his interest in the slave, upon the ground of Maddux's adverse possession, at the time of its execution. Our statute for the suppression of maintenance and champerty, and the purchase of pretended titles, has no application to slaves, or assignments of *personal* property; and upon the common law principle, that choses in action are not assignable, we think no such conclusion can be supported.

We are aware that the authorities are at variance upon this point; but we think the doctrine, as laid down by Mr. Justice Story, in the case of *Brig, Sarah Ann*, 2 Sumners' Rep., 211, is more reasonable and correct doctrine. He said, in that case, that he "knew of no principle of law which establishes that a sale of personal goods is invalid, because they are not in possession of the rightful owner, but are withheld by a wrong-doer. The sale is not, under such circumstances, the sale of a right of action, but a sale of the thing itself, and good to pass the title against every person not holding the same, under a *bona fide* title, for a valuable consideration, without notice, and *a fortiori*, against a wrong-doer." 2 Kent's Com., 492; Story on Con., §§ 582, 583.

The ancient principle of the common law, that the assignment of a chose in action was void, as savoring of maintenance and champerty, had its origin in the

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peculiar state of society in England, at the time of its adoption. The mischiefs which it was intended to suppress, great as they may have been there, are of a character from which we have but little to apprehend under our institutions. But even in England, the maxim that a chose in action is not assignable, has been long, in a great degree, disregarded, as it must be in every commercial country, where the great mass of personal property must necessarily lie in contract. For a long period, it has been well established in the jurisprudence of that country, that courts of law will give the same protection to the assignee of a chose in action, which formerly, could only have been given by a court of equity.

Nothing of the ancient doctrine remains, save the mere formal requirements, that the action shall be brought in the name of the assignor; and in the language of Bulleyn, J., 4 Term. Rep., 341, this is merely a *shadow*. v

A right of action may arise upon the breach of an *implied* as well as of an express contract; or it may also arise from a wrong or injury; but rights of action growing out of personal wrongs, depend upon their own peculiar principles, and cannot properly be classed under denomination of personal property; and therefore, assignable choses in action mean only such, as can, with propriety, be ranked as personal estate. 2 Bl. Com., 397. In this State, the maxim of the common law is regarded as having been entirely exploded. 1 Meigs' Dig., p. 85; 1 Yerg. R., 175; 3 Cow. R., 623.

Not only may the assignee of a negotiable paper sue in his own name, but by the act of 1801, ch. 6, § 54, the assignee of "bonds with collateral conditions, bills, or notes, for specific articles, or the performance

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of any duty," may sue in their own names, as well in courts of law as in equity. And the act of 1825, ch. 29, has gone still further. In cases where the equitable interest only passes by the transfer of a chose in action, and the mere form is still to be observed, of bringing the suit in the name of the assignor, that statute expressly declares, that the person for whose use the suit is brought, shall be held and deemed the *real plaintiff*, on record.

We think it clear then, that upon this ancient maxim of the common law, no argument can be founded against the validity of the sale of personal goods, upon the ground that the possession thereof, at the time of the sale, was not in the vendor, but in the adverse possession of another.

It follows, that Kimbro, by the execution of the bill of sale, was divested of all interest in the slave, and of course of all right of action, either for the recovery of the slave or the proceeds for which she was sold.

Judgment affirmed.

ROBERTSON *vs.* ROBERTSON *et als.*

PARTITION. Notice. Infant. Guardian ad litem. The notice required by the act of 1799, ch. 11, or the publication required by that of 1831, ch. 37, must be employed in all applications for the partition of lands in which infants are interested, as they cannot otherwise be properly before the court. The appearance of a guardian *ad litem*, who answers for the infants, does not make them parties and dispense with the necessity of notice or publication.

SAME. Must not be partial. The statutes relating to the partition of lands contemplate a complete and entire partition among all the heirs; hence a partition which allots to some of the heirs their portion and leaves the portion of other heirs undivided is partial and unwarranted.

SAME. Mode in which it should be made. The shares of land allotted to the parties interested must be each of the same value. A partition made by the allotment of shares of unequal value, but to be equalised by the payment of money by those who have an excess of land to the others, is in conflict with the purpose of the act of 1815, ch. 123.

SAME. Estates in remainder. The various statutes relating to partition do not apply to estates in remainder or reversion.

GUARDIAN. Ad litem. Appointment. When infants are to be heard by a guardian *ad litem* the record should show the appointment of such guardian.

The decree of the circuit court, to reverse which this writ of error was prosecuted, was rendered at the January Term, 1852, of the circuit court for Davidson county, TURNER, Judge, presiding.

GEO. MANEY and SMILEY, for plaintiff.

JNO. A. McEWEN, for defendant.

CARUTHERS, J., delivered the opinion of the court.

Dr. Peyton Robertson died in 1840; out of his real estate one hundred and forty-five and a half acres, about three miles west of Nashville, was assigned to his widow, Ellen M. Robertson, for her dower.

The petitioners, F. J. and J. B. Robertson, together with Alex. C. and Alice Robertson, who are minors, are

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his heirs at law, and, as such, owners of the remainder in the land. The petitioners made several applications to the circuit court of Davidson, at its January and May terms, 1852, for the partition of said land, so far as to have laid off to them their respective shares of the land. The widow was made a party and answered for herself and as guardian *ad litem* for the infants, agreeing that the petition should be granted. Commissioners were appointed in each case, and set apart to the petitioners respectively their one-fourth, leaving the other two-fourths undivided. The whole proceedings were instituted and completed at the same term, without publication or notice. The cases were brought up by writ of error at the instance of the petitioners.

We think the proceedings are erroneous and void.

1. Because the notice required by the act of 1799, ch. 11, was not given. That act provides that "a notice in writing, at least ten days previous to the time of presenting such petition, stating the time intended for presenting it and the court to which such petition is to be presented," shall be "served on every person therein concerned." It further provides that "no petition shall be presented for the purpose aforesaid until ten days after such service of notice." The only substitute provided for in the statute is publication three times in some newspaper printed in this State, six months before such application. Car. & Nich., 515. This has been changed to three months, by the act of 1831, ch. 67. In this case no such publication was made or notice given. If the parties concerned had all been adults, their appearance and agreement would have been a waiver of the necessity of notice. But here two of the heirs were infants and they appear and answer by their mother, as

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guardian *ad litem* and she agrees for them, that the petition may be granted. In *Frazier and Tulloss, ex'rs. vs. Pankey et al.*, 1 Swan, 78, this court decided that an answer put in by a guardian *ad litem*, does not make the infants parties and dispense with the service of process. "A guardian *ad litem* cannot, by his consent, make his ward a party to a suit." The infant must be served with process.

2. Even if the guardian had the power contended for, yet the proceedings in these cases are bad, because there is no part of the record which shows her appointment. She says in her answer that she is the "lawfully appointed guardian *ad litem* of the infants. This is not sufficient. The record must show the action of the court conferring that character upon her.

So, the notice required by law was not given; nor can the necessity of it be legally waived by the answer of Ellen M. Robertson, because this cannot be done by a guardian, and if it could, she was not properly vested with the powers of a guardian, either general or special.

3. We do not believe the statutes of the State authorize a partial partition of land. Here the parts of two of the heirs were allotted to them by metes and bounds and the other left undivided. The acts on this subject contemplate a complete and entire partition among all the heirs and the shares be made equal in value.

4. In each of these cases the shares allotted to the petitioners were considered by the commissioners as more valuable than the remaining shares, and according to the provisions of the act of 1787, ch. 17, § 1, they are ordered to pay the excess to the minors. That provision in the act of 1787, was repealed by the act of

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1815, ch. 123, Car. & Nich., 315, by necessary implication. The latter statute directs that the commissioners appointed to partition land, shall divide it "in proportions of equal value and not quantity, as heretofore practiced."

This change of the law was intended to prevent the injury that might often result to an heir, by being charged with the payment of a sum of money for an excess of land, which he did not want, or, in fact, might be unable to pay without a sale, even at a ruinous sacrifice of the land allotted to him.

It is, in effect, forcing such heir or tenant in common, to buy land against his will, on the one side, and on the other, compelling a joint owner to part with a portion of that to which he is entitled by law. His right is an equal share in value, and he should not be forced to take more or less. The law fixes and regulates his interest, and no court has the power to change or modify it.

But all reasoning on the subject is rendered unnecessary, as the directions of the act of 1815, are direct and peremptory.

In the case of *Bledsoe vs. Britt*, 6 Yerg., 458, decided in the year 1834, this question came before the supreme court of this State, and the judges were equally divided in opinion: Judges Greene and White entertaining the views now taken by us, and Judges Catron and Peck the opposite opinion. The case went off with the opinion of Judges Catron and Peck, as they concurred with the inferior court. It is in the recollection of one of the members of this court, that this decision was afterwards expressly overruled in an unreported case at Knoxville, several years afterwards. For this reason, and because

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we cannot concur in its soundness, we are constrained to disregard the case of *Bledsoe vs. Britt* as authority.

5. Our acts on the subject of partition do not, as we think, apply to interests in remainder or reversionary estates. We are not aware that there has been any decision of this precise question; but in *Norments, adm'r vs. Wilson et als.*, 5 Humph., 310, it is held that interests in reversion or remainder cannot be sold for partition under the acts of 1827, ch. 54, or 1829, ch. 35. We can see no good reason for a distinction between the cases. It would be against the analogies and symmetry of the law to make any. And we think in either case the interest of minors requires that direct partition or sale for that purpose, should not be allowed until a right of present enjoyment accrues by the termination of the life-estate.

There are other defects and irregularities in these proceedings, which it is unnecessary to examine. We have thought it necessary to decide all these points, for the regulation of the practice, and the security of titles.

The decree of the circuit judge, will, therefore, be reversed, and the petitions in both cases dismissed, at the cost of petitioners.

ALLISON *vs.* THOMPSON, *adm'r.*

COSTS. How and by whom to be paid, when the plaintiff joins several causes of action by means of several counts, and recovers upon some, but fails upon others. Practice. Where a plaintiff joins several causes of action by means of several counts in his declaration, and recovers as to some of the counts, but fails as to others, he can recover only such costs as are incident to that count of the declaration upon which he succeeds; while the defendant is entitled to recover such costs as have accrued in consequence of the counts upon which the plaintiff has failed. In such case, the proper practice is to render judgment and award execution in behalf of the defendant, for such costs as he may be thus entitled to recover.

The motion made by the defendant, as stated in the opinion, was, at the December Term, 1852, of the circuit court for Bedford county, refused, DAVIDSON, Judge, presiding. The defendant appealed in error.

WHITESIDES and KEEBLE, for plaintiff in error, cited 4 Yerg. 561-2; 9 *Ibid.* 33; 3 Humph. 206; 3 Ire. 549; 1 Chitty Pl. 12, 13.

WISENER and E. COOPER, for defendant in error, cited act of 1794, ch. 1, § 1; 7 Humph. 29; 10 *Ibid.* 468.

TOTTEN, J., delivered the opinion of the court,

The action is debt. In the declaration there are seven counts, in each of which a separate and distinct cause of action is alleged. The first is upon two notes for the payment of money; another is, for so much money, the price and value of a bay stallion and a sorrel gelding, &c. To these several counts the defendant pleaded in defense, and issue was taken thereon. The verdict was for the plaintiff on the *first count* for ninety-six dollars and sixty-three cents, the amount due on one of the

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notes therein named, and for the defendant on all the other counts.

The judgment was for the plaintiff for said ninety-six dollars and sixty-three cents, *and full cost* incident to the suit. Many witnesses were in attendance and examined, but none of them as to the *first* count; their evidence was confined exclusively to the other six counts.

The defendant moved the court to tax the costs of said witnesses to the plaintiff, and to render judgment therefor in defendant's favor, which was refused by the court, and judgment rendered as before stated; to which defendant excepted, and appealed in error to this court.

We may observe, that in the English practice, each party pays his own costs as they accrue in the progress of the suit; and at the end of the suit, they are taxed against the party who is legally liable to pay them, and thus the other party *recovers* his costs in that behalf expended.

And in the case of several counts joining separate and distinct causes of action, the plaintiff was not entitled to costs upon any counts on which he did not succeed; nor was defendant allowed costs on such counts, being the same on which he succeeded, except in special cases. 3 Yer. R. 654; 6 Ire. R. 602; 2 B. & P. 334; 5 East. 261

Finally, by a general rule, 2 W. 4, the defendant was allowed the costs of all issues found in his favor. 1 Chitty Pl. 450.

In our practice, a general rule is prescribed by statute, that "in all actions, the party in whose favor judgment shall be given, or in case of a *non suit*, &c., the defendant, shall be entitled to *full costs*." Act 1794, ch. 1. § 74. Where the declaration contains but *one cause* of action, or where it contains several and the plaintiff recov-

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ers on them all, the rule is simple and of easy application.

But in the case before us, there is a joinder of seven separate and distinct causes of action, on each of which a separate suit would lie; the plaintiff recovers in one, and is *cast* in all the others. The costs in question accrued in the trial of those counts on which he was *cast* or non-suited. Now shall he, nevertheless, recover these costs of the defendant?

It is said that, by the words of the statute, he is entitled to *full costs*. We do not so construe the statute. He is entitled to full costs in all the causes of action or counts on which he succeeds, and on which judgment is rendered in his favor. In the present case, he recovers ninety-six dollars and sixty-three cents, and his costs about his suit in that behalf, or for the recovery thereof, expended; but not his costs in the other causes of action or counts on which he was non-suited. On these counts, no judgment is rendered in favor of the plaintiff; the judgment is in fact for the recovery of the right stated in the first count, and as costs are only incident to a recovery, the costs in the latter counts cannot be given to the plaintiff who did not recover, but should be given to defendant, who did recover upon those counts. If the actions had been separate instead of joined, the result would have been the same, and it is not in the power of the plaintiff to join to one good cause of action, a number of unjust demands, and take the chances of litigation upon them at the inevitable expense of the defendant, whether he recover upon them or not. Such a practice would put it in the power of a plaintiff to oppress and ruin a defendant with costs; and the principle upon which it is assumed, is so unreasonable and unjust in

[*Allison vs. Thompson, Adm'r.*]

itself, that we cannot think it was so intended by the Legislature. On the contrary, the statute intends that if the plaintiff succeed in his demand, he shall have costs as an incident; but if he fail, he shall pay costs to the defendant. The same principle will apply where a number of causes are joined in the same action, and the plaintiff succeeds as to some of them, and fails in the others. It is in effect a non-suit, as to the alleged causes of action in which he does not succeed. We think it clear that this is the true construction of the statute; and thus construed, it declares a just and equitable rule. We need hardly say, that where the several counts contain the *same* cause of action, only varying in the statement so as to avoid a variance in the proof, and the like, the rule can have no application. It can apply only where there is a joinder of two or more causes of action. The plaintiff is entitled to all such costs as are in any wise connected with the cause of action in which he recovers. So that nothing perhaps could remain, except the costs incident to the proof in the other causes of action on which he does not succeed.

Assuming that defendant is entitled to these costs, as in cases of non-suit, we are next to consider the remedy by which he shall recover them.

Must he be remitted to another action to recover his costs, or will the court regard the costs as an incident, and finally dispose of them in disposing of the suit? Certainly the latter is the proper course, as it judicially appears that the defendant is entitled to a portion of the costs. There can be no question, we think, as to the inherent power of the court over its suitors, to make the proper orders in this respect, and to enforce them according to its practice in other cases. That is, to ren-

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der judgment and award execution for such costs, if they be not paid.

This practice is founded in principle and convenience, and we think it proper to adopt it in the present case. For the costs exclusively incident to the separate and distinct cause of action, as stated in the counts on which the plaintiff did not succeed, the defendant is entitled to judgment against the plaintiff.

The judgment of the circuit court in this respect is reversed, and the cause is remanded, with direction to proceed on defendant's motion as to costs, in conformity to this opinion.

Judgment reversed.

MANKIN vs. THE STATE.

ROADS. Evidence. Record. County court. Upon the trial of a prosecution for obstructing a public road, a record of the county court, which is introduced for the purpose of showing the road to be one established in pursuance of the statutes, must not only show the order appointing a jury of view, and the order establishing the road, but it must appear from the record, that there was a competent court for this purpose.

Mankin was tried and convicted of the offense of obstructing a public road, and judgment was accordingly rendered against him in the criminal court of Rutherford county, at its May Term, 1852, TURNER, Judge, presiding; whereupon he appealed in error.

E. A. KEEBLE, for plaintiff in error.

[Mankin vs. The State.]

ATTORNEY GENERAL for the State.

TOTTEN, J., delivered the opinion of the court.

John Mankin was convicted and fined on an indictment for obstructing a public road, and has appealed in error to this court. On the trial, the attorney for the State, produced and read in evidence, a record from the county court, purporting to lay off and establish the road as a public road, to which defendants below, objected.

The record is bad, because it does not appear that there was a competent court to order and appoint a jury of view; nor again, in the coming in of their report, to confirm the report, and establish the road. A competent court for these purposes, consists of twelve, or one third of the acting justices of the county; but three are competent to appoint overseers of roads. 1804, ch. 1; 1835, ch. 6. The fact of a competent court may appear in the caption of the record, or be recited in the order, as that twelve, or one third of the justices were present. But here there is no caption, and no such recital.

It is also objected, that it does not appear that the jury were freeholders, or that they were sworn, except by their own report; in that they say, that they were freeholders, and duly sworn. This, we think sufficient. If a competent court appear, every presumption is to be made in favor of the regularity and correctness of the proceedings; for it is a court of general and exclusive jurisdiction on the subject of public roads. And when a public road has been established by a competent court, and its judgment therein remains unreversed,

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it is not competent, in a collateral proceeding like this, to show informalities and defects in the orders taken in the county court, to establish it. But the person interested must object to the proceeding when it took place, or otherwise reverse it upon appeal in error. 1811, ch. 3; 1819, ch. 26.

Under this latter act, parol evidence, of the public character of the road, is made competent to establish the fact, *prima facie*, until the contrary appear by the production of the county court records; from which it may appear that its action was void, for want of a competent court, or that the road has been discontinued, or the like. Let the judgment be reversed, and the cause remanded.

Judgment reversed.

SUGG vs. TILLMAN et als.

FRAUDULENT CONVEYANCE. *Trust deed.* An assignment in trust by a debtor, for the benefit of a portion of his creditors, of all his property, of every description, consisting of real and personal estate, and including corn, fodder, bacon, &c., farming utensils, household and kitchen furniture, with a reservation, by the debtor, in the deed to this effect: "reserving to myself, however, out of the aforesaid stock, farming utensils, provender, provisions, household and kitchen furniture, so much as I am, by law, allowed to retain free from execution," is fraudulent and void in law, whether so intended or not.

On the 12th February, 1850, John Tillman conveyed to trustees, for the benefit of certain of his creditors, several tracts of land, seventeen negroes, and the deed

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proceeds to convey, thus: "all my stock of cattle, being about fifty head, eight head of horses, two mule colts, all my stock of hogs, being between sixty and seventy head, one ox wagon, one ox cart, one carryall, all my plantation tools of every description, one sett of blacksmith's tools, including the bellows, all of my last year's crop of hemp, being about twenty thousand pounds, from sixty to seventy bushels of hemp seed, all my corn, fodder, hay and oats, one hand spinning machine, about two thousand five hundred pounds of bacon, in my smoke house, one hundred and twenty thousand pounds of salted pork, in Alabama, all my household and kitchen furniture and utensils of every description." There was inserted in the deed, a stipulation which authorised the trustees to take immediate possession of all the property conveyed, "and as soon as practicable after advertising," &c., to sell the same; there was also inserted the reservation quoted in the opinion. The complainant being a judgment creditor of Tillman, but not a beneficiary in the trust, filed his bill in the chancery court at Shelbyville, to set aside this conveyance. At the August Term, 1852, Chancellor RIDLEY presiding, there was a decree declaring the conveyance fraudulent and void.

E. COOPER and E. A. KEEBLE, for complainant, insisted, that the conveyance was fraudulent and void, because it conveyed a large amount of stock, &c., without identifying, in any manner, such portions as were to pass by the deed, and such as were to be reserved, and also because of the reservation itself, and cited 7 Humph., 191-2; 1 Ire., 490; 5 Cow., 547; 20 Johns. Rep., 449; Meigs' Rep., 328-9; *Ibid.*, 583-4; 10 Yerg., 151-2.

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READY and WISENER, for respondents.

CARUTHERS, J., delivered the opinion of the court.

This bill is filed by the complainant, as a judgment creditor, for about thirty-three hundred dollars, of John Tillman, to impeach and set aside for fraud, a deed of trust made to his son, Lewis, and M. B. W. Brown, as trustees for the benefit of a part of his creditors, on the 12th February, 1850.

Much amplitude is given to the case in the record and briefs, and great zeal and ingenuity displayed in the argument. But after considering of the whole case we feel satisfied to rest our decision upon one of the many questions made and appearing on the face of the deed.

After conveying all his land, negroes, stock, corn, fodder, bacon, pork, and farming, household and kitchen utensils, and all his furniture, a reservation upon it is inserted in these words: "Reserving to myself, however, out of the aforesaid stock, farming utensils, provender, provisions, household and kitchen furniture, (as all of my property, of that description, as well as every other description, is intended to be embraced by this conveyance,) so much as I am by law allowed to retain free from execution."

There is no legal proposition better settled than that an assignment in trust for the benefit of chosen creditors, which secures upon its face, any benefit or advantage to the debtor who makes it, is void in law, as to all other creditors. *Dauver vs. Handley*, 3 Yerg. 505; *Peacock vs. Tompkins*, Meigs, 317, 328, 584; *Crutcher vs. Horton*, 4 Yerg., 541. The case of articles consumed

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in their use, being reserved, falls under this principle. In relation to these it is decided in the case of *Trabue vs. Willis*, Meigs, 584, by this court, that even if it were proved that such articles so reserved in the deed, were sold and the proceeds applied to the debts secured, it would not save the deed and restore it to legal vigor, as the law pronounces it void.

Now, is there not an express reservation of a portion of the property conveyed, for the use and benefit of the debtor, in the clause above extracted, in direct conflict with this principle? This fact alone must certainly be fatal to this deed, unless there is an antidote to be found in the provisions of the acts of assembly for the benefit of insolvent debtors. These laws should be upheld in all their vigor, being laudable and humane in their object. But it will not do to permit them to be used as a mask for fraud, or to mix and confuse the articles set apart by them for the unfortunate debtor, with assignments of his property voluntarily made for the benefit of favored creditors. How are excluded creditors to know what articles in particular, are claimed under those acts, if they are thrown into confusion with a large quantity of property of the same nature and description? The person claiming this benefit of exemption, must set apart what the law allows him, that it may be known by all who are concerned, and separated from that part of his estate which is subject to his debts. But in this deed it is included in the conveyance with the mass of his property, and reserved in general terms. Creditors are not able to judge whether the quantity or kind of property specified in the law is claimed, as there is no separation or description of it. This exempted property is strongly guarded and

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protected by penalties against officers and others who attempt to interfere with it, and for that reason also, it should be distinctly marked. There is no way here to distinguish it from the other property, and we can only regard it as a reservation in this deed of a benefit and advantage to the debtor, intended to keep off and defraud other creditors. But upon another ground, it would avoid the deed. It is in the nature of a sale of all the property of the vendor of the same nature, to these trustees, for the payment of debts, except so much of the same as he is allowed by law to hold exempt from execution. Now what is sold is not separated from that which is reserved from the sale. All the corn lies together in the heap, all the pork in the smoke-house, all the horses in the stable, all the cows in the pen, &c. &c. The vendees or trustees cannot bring trover for the quantity conveyed to them, because it is not separated from the part retained. They have no title in any particular thing or quantity. The debtor may pass his claim from one part of the bulk to another, under this undefined right until all is consumed. The property therefore under this principle, not passing at all, remains subject to other execution creditors, to the complainants.

So it will be seen that this single provision in the deed, under our view of the law, is a poison which diffuses itself through the whole instrument and works its destruction as to creditors.

Many other objections of more or less force are made to this deed, which it is unnecessary that we should notice, as the one above stated and discussed is decisive of the case.

We therefore, declare that the deed of trust under

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consideration, is fraudulent and void in law, (whether so intended by the parties or not, which we do not decide) as to the complainant, who is entitled to the relief given by the chancellor below in his decree, which we affirm. The costs of this court will be paid by the defendants.

CONGER vs. JAMES.

ARBITRATION AND AWARD. *Mistake of the arbitrators.* Where it clearly appears upon the face of an award, or by the evidence of the arbitrators, that in making the award, there was a mistake in a matter of fact, it is a valid objection to the award.

SAME. *Award must be final.* While it is true that an award may be good in part only, yet to be valid, it must be mutual or final. Hence where work has been done by one party for the other and payments have been made therefor, and the matter is submitted to arbitrators to determine the value of the work and the amount of the payments, the award is void if it state the value of the work and omit to determine the amount of the payments.

SAME. *Practice.* When an award which is to be made the judgment of the court, is submitted for that purpose, if the award be void for want of mutuality, the court cannot (upon the admission of the party in whose favor the award is that the other party is entitled to credits not given him in the award, and because of which the award is defective,) correct the award and render judgment upon it as corrected.

The judgment of the circuit court of Davidson county, in this case, was rendered upon the facts stated in the opinion, at the May Term, 1852, MANEY, Judge, presiding. The plaintiff appealed in error.

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TRIMBLE, for plaintiff in error, cited *Newland vs. Douglas*, 2 Johns. R., 62; *Barrow vs. Todd*, 3 *Ibid.*, 367; 9 *Ib.*, 212; 10 *Ib.*, 143; 17 *Ib.*, 405; Peck's R., 274; 7 Yerg., 253-4-8; 6 Humph., 171-4.

EWING & COOPER, WM. THOMPSON and HALBERT, for defendant in error, cited Billings on Awards, 46, 92; 8 East, 450; Dyer, 242, a; 2 Bing., 199; 7 East, 81; 8 *Ibid.*, 13; 16 *Ibid.*, 58; 6 Ves., 70; 7 Mod., 345; 2 Brev. Rep., 62; 19 Wend., 68; 14 Johns., 95; 5 Smedes & Marsh., 712; 3 Harr., 442; 1 Pike, 206.

TOTTEN, J., delivered the opinion of the court.

The plaintiff sued the defendant in the circuit court of Davidson, on his carpenter's bill, for building a house for defendant. Some payments had been made, but the justice of the account, as stated, was disputed. Thereon, the parties, by a bond to that effect, referred the whole case to the award of Atkinson and Simpson. Their award was to be the judgment of the court. In their reference bond, the parties recite that their object is, "to get their disputes, differences, and mutual claims on each other in the premises, finally settled." And they say: "We agree that said arbitrators shall take our written contract, made in 1850, in relation to said work, and shall examine the work done by said Conger, and where it comes up to the contract, to pass it, and on all the work that does not come up to the contract they are to make a proper deduction, according to quantity and quality; and where the work goes over the contract, they are to allow said Conger a fair valuation for said extra work, according to quantity and

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quality; and for work done out of the contract, by said Conger, he is to be allowed a fair valuation for the same." The said James was to be credited for what he had already paid.

The award is in general terms, and decides "that said James is indebted to said Conger on account of said work, in the sum of two thousand three hundred and seventy-nine dollars and eighty-four cents."

At the June Term, 1852, of the circuit court, the parties appeared, and the plaintiff moved that said award be made the judgment of the court, which motion was resisted by the defendant. It thereon appeared, by the testimony of the arbitrators, that the sum stated was for the whole value of the work; that no payments were taken into consideration or deducted therefrom; that payments were spoken of and the amount stated to be some ten or fifteen hundred dollars. No proof of payments was offered or called for. It further appears, that a part of the work included in the original contract, was taken for extra work, not so included, and its value charged to defendant. This was by mere mistake. One of the arbitrators states it at two or three hundred dollars; another at thirty or forty dollars.

The counsel for the plaintiff offered to deduct such payments as defendant, by proof, could show himself entitled to, and also the thirty or forty dollars charged by mistake, for extra work; to which defendant objected. The court thereon, refused to make the award the judgment of the court, and the plaintiff has appealed in error to this court. Several objections are taken to this award.

First: the mistake. Where a mistake, in a matter of fact, clearly appears on the face of the award, or by

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the evidence of the arbitrators, that is a valid objection to the award. For, it is not their judgment, or the award they intended to make. Billings on Awards, 61 margin.

Now, here the mistake plainly appears, from the evidence of the arbitrators. They say, that by mistake, they charged the defendant, as for extra work, which was not extra work, but included in the original contract. They differ only as to the amount, and their difference in that respect is very considerable. This, however, cannot affect the case, as the fact of a mistake to an amount that is material, evidently appears.

Second: that the award is not mutual or final. An award that is not mutual is void; because, the power to make the award is confirmed by the joint action of the parties, upon mutual agreement to perform it; so likewise it must be final.

It is true, that an award may be good in part, where the matter omitted may be clearly separated from the matter awarded, and has no dependence upon or connection with it. *Stone vs. Philips*, 4 Bing., N. C., 40.

But the arbitrators have made their award upon one side only. They have stated the value of the work done, but have omitted to state the payments made upon it. The payments were submitted and may be disputed. They adjudged that defendant is indebted to the plaintiff in the sum of two thousand three hundred and seventy-nine dollars and eighty-four cents. But this is not so; for the bond of submission admits that payments have been made, and were to be allowed. It appears, also, in the proof, that these payments are considerable. The award takes no notice of them, but merely determines that defendant is indebted on account of the

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premises, in the amount stated. They do not say that there was no proof of payment or that any proof was offered or demanded. They do not consider that part of the case, though it was necessary to the matter they were considering.

They should have determined the amount of payments, or have stated that no proof of payments was offered. For, if judgment be rendered upon this award, how is defendant to procure his credits against it. His payments being submitted, are concluded by the award, in the same manner as if he had pleaded payment to an action on the original demand.

Third: the plaintiff offered to credit the award by such payments as defendant, by proof, could show himself entitled to; also to credit it on account of the mistake in the extra work, by thirty or forty dollars.

The answer to this is, that it was not pertinent to the question, whether the award was valid or not. It admits in effect, that it was not valid; and that was the only question to be considered by the court. If it were void, the plaintiff's offer in this respect, could not cure it and make it valid. Besides, by what form of trial was the court to ascertain the amount of the payments, the parties not agreeing as to the amount? And as to the thirty or forty dollars on account of the mistake in the extra work, the defendant claims a still greater amount. We consider this offer, on the part of the plaintiff, as a mere matter of compromise, which the defendant was at liberty to accept or not at his discretion. It involves no legal question to be determined by the court.

The award being void, it was, of course, not error to refuse to make it the judgment of the court.

Judgment affirmed.

WOODRUM et als. vs. KIRKPATRICK, et als.

CONSTRUCTION OF WRITINGS. Will. The will of the testator contained the following provisions: "My will and desire is, that all my negroes not otherwise bequeathed, shall be valued and put into lots and divided amongst all my children; the ones drawing the most valuable lots to pay over to the less valuable the difference in cash, share and share alike." Again: "My will and desire is, that all my land be sold by my executors, hereinafter mentioned, to the highest bidder, on twelve months credit, and the proceeds to be equally divided between my wife and children. It is my will and desire that the portions or lots which are or may be assigned to Jane Woodrum and Mary Welsh, my daughters, shall be held by them for the benefit of the heirs of their bodies, not subject to be sold, bartered or traded by their husbands." *Held* that by the first clause above quoted, Jane Woodrum was vested with an absolute estate in her portion of the slaves, and that by the last clause quoted this estate is to her sole and separate use.

HUSBAND AND WIFE. Joint sale of wife's property to discharge the husband's debt. Though the wife join with the husband in the sale of property bequeathed to her to be held by her to her separate use; and "not to be sold, bartered or traded by her husband," if the sale be made to one who contracts with the husband, and makes the payment to the husband, it is void as to the wife.

SAME. Same. Slaves. Privy examination. A sale of slaves which are the sole and separate property of the wife, by the husband and wife jointly, without the privy examination of the wife, is void.

APPEAL. Chancery. Original bill and cross bill. An appeal from the decree of the chancery court rendered upon a cross bill, opens the whole case presented both by the original bill and the cross bill, though there be no appeal from the decree dismissing the original bill.

This was a bill filed in the chancery court at Lebanon, upon the following facts: In the will of Cunningham Smith, who died in 1840, are the following provisions: "Item 5th. My will and desire is, that all of my negroes not otherwise bequeathed, shall be valued and put into lots, and divided amongst all of my children; the one drawing the most valuable lots, to pay over to the less valuable the difference in cash, share and share alike." "Item 7th. It is my will that the portions or lots which is or may be assigned to Jane Woodrum and Mary Welch, my daughters, shall be held by them for the benefit of

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the heirs of their bodies, not subject to be sold, bartered or traded by their husbands."

The negroes in dispute went into possession of Stephen and Jane Woodrum under this will, soon after testator's death. On the 1st of March, 1847, by their joint bill of sale, they transferred them to Thomas Kirkpatrick for nine hundred and thirty-six dollars then paid them, by extinguishing a debt due from Woodrum to Kirkpatrick. Kirkpatrick, by an instrument of the last mentioned date, gave them a right to re-purchase said slaves at any time before the 1st of May following. They failed to pay at the time, but were left in possession of the slaves at a small hire, till May, 1850, when Kirkpatrick, wishing to take said slaves, said Stephen and wife filed their bill to prevent him, alleging that the transaction of 1840 was a mortgage, and praying to be allowed to redeem, stating that the purchase money was paid, and praying further to have the slaves restored and settled as under the will of Cunningham Smith.

Pending this bill on the 2d of July, 1850, Woodrum, the son, and Lannum and wife, daughter and son-in-law of Stephen and Jane, file their bill in the nature of a cross bill, to assert their claim to said slaves "as heirs of the body" of Jane Woodrum, and claiming that she had no estate in said slaves for her own use, but was only a trustee for the benefit of these last complainants. The chancellor, RIDLEY, at the July Term, 1852, dismissed the original bill, from which there was no appeal. Upon the cross bill, and in construction of the will, the chancellor decreed that Jane Woodrum was entitled to a separate estate for life which had passed by the sale to Kirkpatrick, and that Woodrum, the son, and Lannum and wife, had a vested remainder in the slaves, to secure which

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Kirkpatrick was ordered to give bond, &c. From this decree both parties appealed.

READY and MARTIN, for the children of Mrs. Woodrum, argued: Mrs. Woodrum takes no interest except as trustee. The bequest is to her children; and she is a trustee to hold the property for them. The term "heirs of her body," as used here, means nothing more or less than her children. The word heirs is always construed to mean children, where it is necessary to carry out the intention of the testator, if it does not conflict with any positive rule of law. It is believed to be obvious that it was the intention of the testator to give the property to the children, and at most but a use to the mother. It is believed this case falls within the principle of *Benton vs. Pope, et al.*, 5 Humph. 392; *Fite vs. Read*, 8 Humph. 328.

CARUTHERS and E. H. EWING, for Kirkpatrick, argued: The rule in Shelley's case must govern this. With regard to the peculiar terms of the will, to-wit: "the property to be held by the legatee for the benefit of the heirs of her body," and no express gift of any estate, it will make no difference in the construction and the application of the rule. *If the interest or profits only* are given to the first taker, and the principal to the heirs, the rule will apply. 1 Vez. Jr., 135, 154; 9 Yer. 241.

The estate given to Mrs. Woodrum is a life estate. The exclusion of her husband from the power to sell, &c., does not alter the case. See *Dott vs. Cunningham*, 1 Bing. 453. Sarah Baker gave her daughter, Sarah Dott, sundry negroes *distinct from her husband*, during life, and at her death to the "heirs of her body." The rule applied.

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Personal estate cannot be entailed, and where it is given to A. and his or her heirs male of the body, or heirs, the whole vests in A. *Seale vs. Seale*, 1 P. W., 290; *Webb vs. Webb*, *Ibid*, 132.

It is a rule of property and not of intention or construction. It must prevail, though it conflicts with intention; 9 Yer. 236.

Houston, Special J., delivered the opinion of the court.

Cunningham Smith died in 1840, after having made and published his last will and testament, in which are the following provisions: Item 5th, "My will and desire is, that all of my negroes, not otherwise bequeathed, shall be valued and put into lots, and divided amongst all of my children, the one drawing the most valuable lots, to pay over to the less valuable, the difference in cash, share and share alike." Item 7th, "My will and desire is, that all of my land be sold by my executors hereinafter mentioned, to the highest bidder, on twelve months credit, and the proceeds to be equally divided between my wife and my children. It is my will and desire, that the portions or lots which are or may be assigned to Jane Woodrum and Mary Welch, my daughters, shall be held by them for the benefit of the heirs of their bodies, not subject to be sold, bartered or traded by their husbands." Shortly after the death of the testator, the negroes in controversy went into the possession of Jane Woodrum and her husband, Stephen Woodrum, and on the 1st of March, 1847, Stephen Woodrum and wife, by bill of sale, conveyed the negroes to the defendant, Thos. Kirkpatrick, for the consideration, as the bill of sale states, of nine hundred and thirty-six dollars, and

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by an instrument of the same date, Kirkpatrick gave them the right to re-purchase the slaves, upon the payment of the nine hundred and thirty-six dollars on or before the 1st of May, 1847. The bill of sale of Woodrum and wife was proved by the subscribing witnesses, there being no privy examination of Jane Woodrum. The negroes remained in the possession of Woodrum and wife, and they not having repaid the nine hundred and thirty-six dollars to Kirkpatrick on the 1st of May, 1847, he was proceeding to take possession of the slaves in May, 1850. Whereupon they filed a bill to prevent him, and charging that the bill of sale was only intended as a mortgage; that the purchase money had been repaid, and praying to have the slaves secured and settled upon Jane Woodrum, as provided in the will of her father.

On the 2nd of July, 1850, whilst the bill was still pending, William A. Woodrum, a son of Stephen and Jane Woodrum, and Geo. S. Lannum and wife, Mary E., their son-in-law and daughter, filed a cross-bill in the cause, asserting their claim to the slaves, under the will of Cunningham Smith, as heirs of the body of Jane Woodrum, and alleging, among other things, that she has no title to them in her own right, but only as a trustee for their benefit.

The chancellor dismissed the original bill upon the ground, that the sale of the negroes by Woodrum and wife to Kirkpatrick, was not intended as a mortgage, but was an absolute sale with liberty to repurchase. Upon the cross-bill, the chancellor decreed, that Jane Woodrum had a separate estate for life in the slaves, under her father's will, which she could convey, and had conveyed by the bill of sale to Kirkpatrick, and that the complainants in the cross-bill had a vested remainder in

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the slaves, and Kirkpatrick was required by the decree to execute a bond conditioned not to remove them from the State, and to have them forthcoming, to be delivered to complainants at the death of Jane Woodrum. And from this decree, upon the cross-bill, both parties appealed, there being no appeal from the decree dismissing the original bill. The whole case, both as to the bill and cross-bill, is before us for examination, and the question for our consideration is, what is the true construction of the 5th and 7th clauses of the will of Cunningham Smith? We cannot assent to the argument that the testator intended to convey the property to his daughters merely as trustees, to hold for the benefit of their children, giving them no estate whatever in their own right. It would require very strong language, indicating such intention, to bring our minds to such a conclusion.

We are well satisfied that by the 5th clause, taken alone, an absolute estate in their own right is given to the daughters of the testator, and this conclusion is strengthened by referring to the former part of the 7th clause as recited in the statement of the facts of the case.

The negroes are to be valued and put into lots and divided amongst all the children; those drawing the most valuable lots, are to pay to the less valuable, the difference in cash. The land is also to be sold and the proceeds of the sale are to be equally divided between the testator's "*wife and his children.*" Without the latter part of the 7th clause of the will, there could be no doubt that the daughters would take an estate in fee in their shares. But how is the case affected by this part of the 7th clause? What did the testator mean by this provision?

He provides that "the portions or lots which is or may be assigned to Jane Woodrum and Mary Welch, my

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daughters, shall be held by them for the benefit of the heirs of their bodies, not subject to be sold, bartered, or traded by their husbands." We cannot give any more force to the words, "to be held by them for the benefit of the heirs of their bodies," than we would in the words "to be held by them and the heirs of their bodies," or, "to go to the heirs of their bodies." In either event, whatever might be the intention of the testator, the case would fall within the rule in the case of *Polk vs. Faris*, and the first taker would be vested with the absolute interest. And so we think in this case, that under the 5th and 7th clauses of the will, Jane Woodrum is vested with the absolute estate in the slaves in controversy. But by the 7th clause, we think the testator also meant to vest his daughter, Jane Woodrum, with the absolute estate in the slaves for her sole and separate use, and this intention not being in contravention of any rule of law, and the words used, being in our opinion, sufficient to create such an estate, we so construe the will, and hold that Jane Woodrum has a separate estate in fee simple, in the property bequeathed to her by Cunningham Smith.

A question is then presented, as to the effect of her joint bill of sale with her husband, to the defendant, Kirkpatrick, of the negroes in question. She takes this separate estate under the will. It provides no mode by which she may convey or dispose of the estate. Had there been a mode pointed out in the instrument under which she derives title, she could only pursue that mode, as has often been decided by this court. But here, there is no provision made for her alienation of the estate. But it is not necessary for us to decide, in this case, whether or not a married woman may convey by

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deed, her separate estate in personal property, upon privy examination, when the instrument creating the estate makes no provision for its alienation by her, in any manner; or whether, in such case, it can alone be done through the intervention of a court of chancery. We expressly reserve that question. But there are two grounds upon which this bill of sale will be held void as to Jane Woodrum. The will provides that the property shall be held by her, not subject to be sold, bartered, or traded by her husband. The answer admits that the consideration for the negroes conveyed by the bill of sale to Kirkpatrick, was a prior debt, due by her husband, Stephen Woodrum, to Kirkpatrick. The sale was for her husband's benefit, and virtually by him, in direct contravention to the will.

Again, this bill of sale was proved by subscribing witnesses, and no privy examination of Jane Woodrum, the *feme covert*, was ever taken. And whether she could convey the slaves by bill of sale, with privy examination without resorting to a court of chancery or not, she certainly could not convey them by bill of sale, *without* such examination, and this bill of sale, as to her, is void, and the title to the slaves in controversy is still in her, under and by the will of her father, as her separate estate; and Thos. Kirkpatrick took no title from her, to the slaves, under the bill of sale. We therefore reverse the decree of the chancellor, dismissing the bill, and also his decree upon the cross bill, and order that the slaves in question be delivered up to Jane Woodrum, as her separate estate under the will of her father.

THE STATE *vs.* LADD.

MALICIOUS SHOOTING. *Indictment. Description of the offence.* In an indictment for malicious shooting, it is sufficient to charge that the accused did, "unlawfully and maliciously shoot," &c. It is not necessary to describe the weapon, the hand in which it was held, the wound that was inflicted, or circumstances attending the act.

INDICTMENT. *Certainty of, in description of offence.* In the description of offences created by statute, or such as are defined, and the punishment of them enlarged by statute, the safest and preferable mode is, to set forth the crime in the words of the statute, as the only effect of too much particularity in the description, except so far as it is necessary for the ends of a proper defense, by a substantial description of the essentials of the crime imputed, is to facilitate the escape of offenders from the just punishment of their crimes, and should not be favored.

The circuit court of Franklin county, at its March Term, 1852, DAVIDSON, Judge, presiding, having arrested the judgment in this case, COLYAR, Attorney General, *pro tem.*, in behalf of the State, appealed in error.

ATTORNEY GENERAL, for the State.

H. L. TURNER, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

At the March Term, 1852, of the Franklin circuit court, an indictment was found by the grand jury, against Amos Ladd, for unlawful and malicious shooting. The charge in the indictment is in these words :

"On the eleventh day of February, in the year of our Lord, eighteen hundred and fifty-two, with force and arms, in the county aforesaid, did, then and there, unlawfully, maliciously and feloniously, shoot one Andrew J. Gossage, of said county, to the great damage," &c.

To this indictment the defendant pleaded "not guilty," and was tried, convicted, and sentenced to two years'

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confinement in the Penitentiary. Defendant moved for a new trial, which was overruled, and then in arrest of judgment, which was sustained, and appeal to this court by Attorney General.

The only ground upon which the motion to arrest the judgment is made, is that the indictment does not give a sufficient description of the offence charged; or, in other words, does not set forth all the circumstances constituting the essential ingredients of the crime. It is true, that the indictment is bad unless it sets forth all the elements necessary to make out the offence, and if any fact or circumstance which is a necessary ingredient in the offence, be omitted in the indictment, it is vitiated. Arch. Cr. Pl., 42. The illustrations of the principle given by the author, are of this character. An officer was assaulted in the execution of process, without showing he was an officer of the court, from which the process issued. 5 East, 304; 8 B. & C., 114. An indictment for speaking disrespectful words to a magistrate, did not show that he was engaged in the execution of his duties at the time. And against a public officer, for non-performance of his duty, without showing he was such an officer as was bound by law to perform that duty; 5 Tenn. Rep., 623. In all such cases the indictment is bad, and the advantage may be taken by demurrer, motion in arrest, or writ of error. 4 B. & C., 461; 1 B. & Adol., 841. Such facts and circumstances must not only be stated, but it must be done with certainty and precision, so that the defendant may be able to determine whether they constitute an indictable offence; Arch. Cr. Pl., 42. This statement need not be what is called "a certainty, to a certain intent in every particular, as in pleas of estop-

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pel," &c., but with a certainty to a certain intent in general, will be sufficient. *Ib.*, 43.

But in the case before us, what are the essential ingredients of the offence? The statutory description is in these words: "No person shall maliciously shoot or stab another." Act, 1829, ch. 23, § 55; Car. & Nich., 325. If the act had said, "with a gun, or pistol," or with powder and ball, the weapon would have been made an essential ingredient in the offence, and it would be necessary that the indictment should describe the kind of weapon, &c. If the act had confined the offence to a shooting in a public place, or an officer in the discharge of his duty, &c., these facts would have constituted necessary elements of the offence, and they would necessarily have to be set forth in the indictment with sufficient certainty. But in this act, no such concomitant, or additional circumstances, or ingredients, are required by the statute. All that the act requires to make the offence complete is the shooting another, "unlawfully or maliciously." The indictment in this case, fills the description of the offence, and adds the word, "feloniously." It is admitted that the forms generally give a more special description, by setting forth the weapon, its contents, the hand it was held in, &c. But this is mere form, and only necessary to make the indictment more artificial. It might be better to adhere to the old forms, but we cannot say it is essential.

It is a general rule, that where an offence is created, or where it is defined, and its punishments enlarged by statute, that an indictment, setting forth the crime in the words of the statute, is sufficient, and indeed, the safest and preferable mode of description. Archbold says, at page 52: "it is better to pursue strictly

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the words of the statute." It is true, that if the statute does not set forth all the ingredients of the offence, or enough to constitute the crime, the indictment must add them. But that is not this case. Here the description of the crime is complete in every essential particular. Of what advantage to the defendant, would it be to name and describe the weapon with which he is shot or stabbed? It is every where decided, even in cases of murder, that the kind of instrument charged need not be proved, but that proof of any other instrument of the same class will sustain the indictment; Arch. Cr. Pl., 136. If the act is charged to have been done with a pistol it will do to prove that it was with a gun or cannon; or if the charge of killing be with a pen-knife, it will be sustained by proof that it was with a butcher-knife, or bowie-knife, &c. Then the kind of weapon is not needful for notice to defendant, because, in the cases I have put, he would not only not be aided in making out his defence, but would be actually misled by the indictment. The author to which we have referred, 136, says, "there is a particularity required in an indictment for murder, that it would be ridiculous to account for and justify." And we might add, as to the effect of this particularity, except so far as it is necessary for the ends of proper defence, by a substantial description of the essentials of the crime imputed, it only tends to facilitate the escape of offenders from the just punishment of their crimes, and should not be favored. In times past, the adherence to strict and unnecessary technicalities to rescue criminals, has been a reproach to the administration of justice, brought the law into contempt, and encouraged crime. Shall we go any further, then, in shielding offenders, when they have, as in this case, upon a fair trial, been pronounced

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guilty by a jury, by opening another avenue to them for escape, upon what must be regarded as a technicality? We are unwilling to do so, without some positive rule of law constraining us.

We have examined carefully, all the cases to which we have been referred, and such other authorities as we have been able to procure, and are of the opinion that none of them conflicts with this opinion, when they are correctly understood.

We therefore reverse the judgment of the court below, arresting the judgment, and proceeding to pronounce the judgment the circuit court should have given, on the finding of the jury, order and adjudge that the defendant be confined in the common jail and Penitentiary of this State, for the period of two years, that being the period fixed by the jury in their verdict.

WHITE vs. CLACK.

ATTORNEY'S FEES. *Not recoverable in an action for mesne profits. The costs which may be recovered in action for mesne profits are only the legal and proper costs taxed in the action of ejectment, not including attorney's fees.*

Upon the trial of this action of ejectment in the circuit court of Giles county at its August Term, 1852, MARTIN, Judge, presiding, there was judgment for the plaintiff, and the defendant appealed in error.

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T. M. JONES, for plaintiff in error cited 1 Smith, L. C., 527; 3 Wils., 121; 1 Coxe, 466; 3 Johns. 481; 1 B. Mon., 198, 200.

BRIGHT, for defendant in error, cited 3 Johns. 481; 1 Harr., & Johns., 403.

McKINNEY, J., delivered the opinion of the court.

This was an action of trespass for mesne profits. The only question we think necessary to be considered, arises upon the charge of court.

The court instructed the jury, that in addition to the mesne profits, the plaintiff would also be entitled to recover such reasonable *counsel fees*, as may have been paid by him in the prosecution of the action of ejectment.

In this, we think, there is error.

Notwithstanding some discrepancy in the decisions upon this point, the established doctrine seems to be, that, in trespass for mesne profits, the plaintiff may recover not only the reasonable value of the rents and profits, but, also, the *costs* of the ejectment.

But, by this we understand to be meant, the legal and proper costs taxed in the action of ejectment, not including counsel fees, or other expenses incurred by the plaintiff in the prosecution of the suit. 2 Stark. Ev., 313; 3 John. Rep., 481.

Upon this ground the judgment must be reversed and the case be remanded for a new trial.

LAYNE, *ex'r. &c.* vs. PARDEE and wife.

CONFLICT OF LAWS. *Domicil. Husband and wife.* It is well settled that where the husband and wife at the time of the marriage, have different domicils, the law of the husband's regulates the marital rights as to moveable property. If the husband have no domicil, then the law of that of his wife would govern.

DOMICIL. *Change of.* To constitute a change of domicil, an intention to change is not sufficient; the fact and the intention must concur.

This was a bill filed in the chancery court at Shelbyville, upon the facts and for the purpose stated in the opinion. At the August Term, 1852, chancellor RIDLEY presiding, there was a decree for the complainant, and the respondent appealed.

E. COOPER, for complainant, cited *Kneeland vs. Ensley*, Meigs 620, 630; *McCollum vs. Smith*, *Ib.* 342; Sto. Con. Laws, §§ 184, 199.

WISENER, for respondents, cited Sto. Confl. Laws §§ 193-4, and insisted that the proof sustained the conclusion that at the time of the marriage, there was an agreement that the matrimonial domicil was to be the future residence of the parties.

CARUTHERS, J., delivered the opinion of the court.

Thomas Layne files this bill as executor of Robert Layne, to get possession of certain negro slaves now in the possession of defendants, which he alleges belong to the estate of his testator, who bequeathed them to defendant, America, his widow, during her life or widowhood, and after that, to be equally divided between her and his five children. A decree had been made to sell them for division, after the marriage of the widow to defendant,

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Miles. But, before the sale, they were attached by the bill of said America, under a claim of separate title, and were hired out by complainant under an order of court, but have been recently taken secretly and unlawfully from the hirers, and are now in the possession of defendant, America. This bill is filed to secure the slaves, and settle the rights of the parties and said complainant in the execution of his trust as executor.

The defendant, America, claims the said slaves under the laws of Texas, where she was married to testator. She says she married the testator in 1837, when she was a minor, and as one of the distributees of her father, then deceased, she was entitled to these slaves; that the children had all agreed that her mother should keep the slaves until she died, which occurred perhaps in 1841. Soon after that event, her brother sent these slaves to her and her husband in Bedford county, with some kind of paper title made by him to her said husband. This she insists communicated no title, as her said brother had none; same being vested in her. The negroes remained, however, in the possession of said Robert Layne, until his death; and after that, passed to his executor, and was controlled by him as such. But she places her claim upon the ground that "by the laws of Texas, at the time of her marriage, the property, both real and personal, belonging to the wife at the marriage, does not go to the husband, but belongs to the wife as though she were a feme sole." That Texas was her domicil, and that it was, by agreement between them, to be the future home of both, and that Layne, at the time of the marriage, had no permanent domicil. They came to Tennessee, she says, to visit his relations, intending to return, but remained here on his farm until his death in the month of April,

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1849. The proof shows that the slaves were moveable, or personal property, by the laws of Texas, but that the marital right did not attach to them in favor of the husband, but they continued after marriage the separate property of the wife as before. So the only question here is, whether the laws of Tennessee or Texas fix and control the rights of the parties to the property.

It is every where settled as a principle of international law, that where the parties have different domicils, the law of the husband's regulates the marital rights as to moveable property, but not as to real; that is governed by the law of the place where it is situated; Story on Con. of Law, § 198; *Kneeland vs. Ensley*, Meigs 628. But what is real and what personal property, must depend upon the law of the place; and it is clear that every State or country may impress upon all property within its limits, any character it pleases, and no other State can vary or disregard it; *McCollum vs. Smith*, Meigs 342. In Louisiana, for instance, they have added slaves, mules, horses, &c., intended for implements of husbandry, &c., to the list of immoveables. This character is impressed upon slaves in Arkansas and several other States. These all in their nature moveables, but the law may change it. But in both Texas and Tennessee they are moveable or personal property, and must fall under the rule laid down above, as to the predominance given to the husband's domicil in controlling the rights of the parties. So, if the fact be that Robert Layne was a citizen of Tennessee in 1837, when this marriage took place, all the personal property then vested in his wife, became his, upon reduction to possession, if there is nothing more in the case. But it is insisted that at the time of his marriage he had no domicil, and promised to settle

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in Texas. This would materially change the case if it is sustained by the proof; but we think the proof very clearly shows that Robert Layne never did relinquish or lose his domicil of birth and of death in Bedford county, Tennessee. It is true that he went to Texas in 1837, to look at the country, and no doubt then as well as after his marriage, and perhaps at times down to his death, had it in contemplation, or rather under consideration, to remove to that State. But there is no sufficient proof in this case to show that he ever did change his home, or obligate himself to do so. His declaration that he intended to emigrate to that county, and that he would go to the negroes of his wife, instead of incurring the expense of bringing them to him in this State, all fall far short of proving that he had bound himself to his wife or any one else, to remove there, or that his purpose even was ever fixed and settled on that subject. But it is enough for this case to see that he was not without a domicil when the marriage occurred, but still retained his domicil of origin. A man is presumed to hold his domicil of nativity until another is obtained; and to constitute this change, the fact and intention must concur. If the parties agree before, or at the time of the contract of marriage, that they would live in a different State than that of the contract, or have reference to a different place of residence, and actually settled there, then the law of that State will govern the rights of the parties; Meigs 628. Here there was no such after settlement; the husband never did change his domicil, but changed his wife's to his. But it is insisted that he agreed to do so, and by that shall be so far bound as to exclude him from any right to her property under the laws of Tennessee, but to have the effect to preserve the

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right in her under the Texas laws. True the parties might by special contract before marriage, control all these rules, and regulate their rights as they might stipulate. And it may be, that if Robert Layne had bound himself as a condition or element in the marriage contract, that their matrimonial residence should be Texas, that her title would have been secured from his marital right under the law of his domicil. But this consequence might still be doubtful, unless the change was afterwards in fact made; yet, in this case, we do not think that state of facts exists, and consequently that question does not arise. Here there is no sufficient proof that he ever so agreed or bound himself. The full extent of the proof is, that he entertained a floating idea of doing so at some time or other. He was a man of good estate, both real and personal, in Tennessee, brought his wife to it, as soon as he married her, and continued on his estate for twelve years, and until his death. His relations were all here; he brought the slaves of his wife here as soon as it was proper for him to do so, in view of an understanding which he would not violate, that her mother should retain the property during her life. It also appears, that after the death of her husband, the defendant in some proceeding in court, upon her oath, admitted the right of her husband to these slaves. This shews at least, that her change of mind on the subject of her rights, is one of the consequences of her second union, and that this new alliance has in some degree changed the current of her feelings as to the direction of this property. We cannot, however, see any principle on which we can sustain her claim, and do therefore affirm the decree of the chancellor in all things.

The cause will be remanded for further proceedings

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in the court below, in the matter of account ordered by the chancellor.

NELSON vs. THE STATE.

PRACTICE. Trial. Examination of witnesses. The practice of examining witnesses upon the trial, separate and apart from each other, is one which is to be controlled in a very great degree, by the presiding judge, and the supreme court will not undertake to revise his practice in this respect, unless there be such a manifest departure from a proper exercise of this discretion, as might result in defeating the great object of the rule.

EVIDENCE. Prisoner's examination by the committing magistrate. The examination of a prisoner by the magistrate before whom he is brought for commitment, being a privilege extended to the prisoner, so that he is thus "allowed to speak for himself," the record of that examination cannot afterwards be used by him, upon his trial, as evidence in his defense.

SAME. Statement of witnesses before the examining magistrate. The record of the evidence of witnesses before the examining magistrate, can only be used upon the trial of the prisoner for the purpose of discrediting a witness who has been examined both before the magistrate and upon the trial, and then only when the witness has been interrogated as to what he said before the magistrate.

SAME. Res gestæ. Declarations of prisoner. The declarations of a prisoner are not admissible as part of the *res gestæ*, unless they are made at the time of the act, which is being investigated, and which they are calculated to characterise; "they must so harmonise and be connected with the act, as to constitute a part of it."

HOMICIDE. Charge of court to jury. While it is true generally, that a failure of the circuit court to charge fully, when there is no essential point omitted, or wrongfully charged, is not error, unless it appear that the court was asked for further instructions; still, upon the trial of a capital offence, it is error if the court (although expounding the law correctly so far as the charge goes) omit to instruct the jury fully and explicitly upon the legal effect of all the circumstances developed upon the trial, which would tend to determine the character or degree of the prisoner's guilt.

The prisoner, a slave, the property of R. H. Hyde, was indicted in the criminal court of Rutherford county, for

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the murder of Sam, a slave, the property of R. H. Spann. At the January Term, 1852, TURNER, Judge, presiding, there was a trial, when the following facts were proved:

“Blankenship saw Sam last, 20th of April of last year. Witness had lived with Spann two years, and worked with Sam. Sam was about thirty or thirty-two years old, and a stout man of his size. Last fall two years ago, Nelson and Sam, with other negroes, were together at a corn shucking at the father's of witness. After the shucking was over they went into a shed room to supper. Nelson took out a large pocket knife and carved some of the meat with it, and went out with his knife open. After a while, he came into where they were eating again, and carved up more of the meat for the company, and then put his knife, shut up, into his pocket, and went out again. Some short time after, witness went into the yard, and found Nelson swearing with his knife in his hand, behind him. Hudson took the knife out of Nelson's hand, and witness kicked him several times and drove him away. At the time Nelson was swearing, Sam was standing with his back to the house, his hands down, one foot placed back against the house, saying nothing, and about six or seven yards from Nelson. Seven or eight other negroes were in the yard, standing about; some of whom were between Nelson and Sam. Witness did not know who Nelson was swearing at—did not remember what Nelson said. Nelson said he wanted his knife; said it was his bailing knife. Witness kept the knife, and afterwards gave it to another of Hyde's negroes, but don't know that Nelson ever got it again. Upon cross-examination, said he never informed Nelson's master about what Nelson had done. Did not hear Nelson quarreling with

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any one, nor did witness see him offer to fight any person at the time above spoken of. Nelson said when his knife was taken away he meant no harm.

"Jim, slave, was at the corn shucking at Blankenship's, last fall two years ago. As he went home—left about the same time with Nelson, and fell in company with him. Nelson said that Sam had caused Blankenship to take his knife from him, and to drive him away, and that he would have his revenge out of him if he lived. Nelson had been drinking. Witness was in the yard, when Mr. Blankenship drove Nelson away; heard no quarrel between Nelson and Sam, or any body else. Nelson said he had his knife out eating with it, and had not shut it up.

"R. H. Spann said: about the 20th of June, 1845, he saw Nelson and another negro coming through a plantation. They were about twenty yards off from him. He heard the other negro propose to Nelson to go and see Sam. Nelson said he did not want to see Sam; that there had been a fuss between them, and he intended to kill Sam if it took him twenty years. Witness saw Sam after he was killed; he was found in the woods about one hundred and fifty yards from the road. Sam's arms were bent with his hands upwards. When he heard Nelson say that he would kill Sam, witness was in the field, on Sunday. He was standing on one side of a string of fence; another fence was run to the one he was behind at right angles, and both fences were between him and the negroes. They were walking towards the fence he was standing behind, and crossed it about twenty yards from witness; and when he first heard them they were about twenty yards from the fence they crossed. Does not know what other negro was with Nelson at

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the time. Did not hear any other part of the conversation. The negroes did not see him at all. He did not speak to them; and knew that it was about the twentieth of June, from his recollection of the size of the cotton. Told no one except his uncle, R. H. Spann, or his great uncle, Hyde, that he heard Nelson say he would kill Sam, until he told R. H. Spann, three months ago. Was present when Sam was found, but did not tell it. Was present with Blankenship, the prosecutor, and others, when Nelson was arrested, but did not tell what he heard Nelson say about killing Sam. Told his uncle, William Spann, next day, after he heard Nelson have the conversation. Told Richard Spann, the owner of Sam, about three months ago, since the last court. Never told him before. Never told Blankenship until about three months ago. Witness lived in one quarter of a mile of Blankenship, the prosecutor, and upon the plantation of his uncle, the owner of Sam. Saw some blood on Nelson's pants when he was arrested: one big splotch and another smaller one on his leg.

"Andrew, slave, proved, that on Sunday, the day that Sam was killed, he went to Richard Bland Vaughan's. That he found there Lack's Simon, McClary's Harkless, Haynes' George, House's Lewis, Nelson, the defendant, and Bob, or Pinn, the son of Simon; that soon after he got there Simon said he was going, or proposed to go up in the cedars. Simon and Harkless had wives at Vaughan's. Lewis went off in another direction, and witness, Simon, Harkless, George, Pinn and Nelson, started together by the spring, and met Sam at the getting-over place from the road near the spring. Sam turned back with them. Witness was on his way home. When they got to near where Mr. Forbes lived, they met three

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other negroes, to wit: Hayne's Jack, Vernon's Sam, and Johnson's Charles. They met in the road, and the three last joined them; they turned out of the road by a near cut, where the road made a bend. They did not go more than one hundred yards from where they turned out of the road, where they stopped. Whiskey was produced by some person; did not remember by whom, and they drank all around. Witness then left them, accompanied by Vernon's Sam, who separated from witness as soon as they got to the road. Witness then went along the road, west, to the house of a free woman of color, named Rachel, and stopped. Went asleep there, and stayed until about two o'clock, when he started home again, going west. About one hundred yards west of Rachel's house, he met with Sam, who came along a path from the north side of the road; the path led through the woods. When Nelson came into the road that witness was traveling, he and witness were near each other, and both of them stopped. Witness saw some blood on the shirt-bosom of Nelson, high up, near the top of the breast, and some, a good deal more, on the leg of his pantaloons. Witness saw some blood on his face, and a scratch from which it came, just beneath Nelson's eye. They then separated; witness going along the road, and Nelson pursuing the path he was in, which crossed the road at the place where they met, and ran in the direction of Nelson's home. Witness stated that the whiskey was produced and drank where they stopped in the woods; that he did not stay longer than ten minutes; that no persons of the company went to Forbes' after whiskey, whilst he was there. That he was not there long enough for any person to have gone to Forbes' and back. That

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the three negroes who met them, were coming along the road, from the direction of the free woman's house; they met in the road before they went into the woods. That when he left, no person but Vernon's Sam left the company with him; that he left all the other nine together, and did not see any of them but Nelson that day. Rachel and her two daughters were at home when he got there, but Rachel went away soon after witness got there, leaving her daughter. Witness went there about twelve, and stayed until about two o'clock. Went asleep sitting in a passage, between the two rooms in the house; was sometimes awake and sometimes asleep, and saw no person there but the family, when he got there, whilst he stayed, or as he left. Witness stated Nelson told him how the blood came on him. Defendant, by his counsel, then asked the witness to tell what defendant said about the blood on his clothes. The State objected to the testimony; the objection was sustained, and the evidence was excluded by the court, to the exclusion of which testimony, defendant, by his counsel, excepted.

"Harkless, slave, said, I belong to Daniel McClary. I knew Sam, the deceased; he belonged to R. H. Spann; and I also knew Nelson, the defendant. I have a wife at Dick Blan Vaughan's. Andrew, George, Lewis, Simon, Nelson, Pinn and myself, were at the house of Dick Blan Vaughan, Sunday. Nelson and Lewis started off together in one direction, and the others and myself started to the spring some short distance from the house, and there I first saw Sam, the deceased. Andrew, Simon, George, Pinn, Sam and witness, started up to the cedars, toward the meeting house. We had gone some ninety yards in that direction, when Nelson, the defendant, overtook

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us. We then went up into the cedars, and all the others remained there until Simon, Sam and myself went to the house of one Forbes, to buy liquor. I think it was in the month of May. We got a quart of liquor at Forbes', and then went back to the place where we left the others; and when we got back, there were three other negroes that come there about the time we returned, belonging to Haynes, Vernon and Johnson. We handed the liquor around to the persons then present, ten in number, which was all drank, and soon after all the persons present left, except Simon, Nelson, Sam and myself. In about fifteen minutes, Simon left Nelson, Sam and myself alone; and in about the same length of time, I left this place, leaving Nelson and Sam, the deceased, together alone. This was on Sunday, and on the next day, at the request of Richard H. Spann, Jr., I showed him and my master, Danl. McClary, the place where I had left Nelson and Sam, the deceased, on Sunday, the day before. There were signs of a scuffle at this place, and I there saw the hat of Sam in one place, and close to it there were two pieces of tobacco, which Sam had, on the Sunday spoken of; and about forty or fifty yards from the place where his hat and tobacco was lying, we found the body of Sam who was dead. This place was in Rutherford county. When Simon, Sam and myself were at the house of Mr. Forbes, Sam got a glass of liquor from him. Sam handed the glass to Simon and he to me; and I handed it back to Sam and he drank out of the glass and threw the balance of the liquor in the glass, away. Sam and Nelson were friendly when I left them in the cedars. This place was some three hundred yards from the road, on the north side of the road, and about

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four hundred yards from the house of free Rachel. The road spoken of ran east and west. The house of Rachel was on the north side of this road. Nelson had left with Lewis before we left Dick Blan Vaughan's. Witness and Andrew got to Vaughan's before Nelson. Nelson had not caught up with us when we met Sam. Nelson must have heard that we were going to the cedars before we left Vaughan's; it was spoken of. We did not meet the three boys of Vernon's, Haynes', and Johnson's, in the road. They came up to us about three hundred yards from the road. We did not leave the road in going towards Forbes', in order to go a near cut. I do not know if Andrew drank any; he had the bottle in his hand. Simon left the place, when he drank, about one quarter of an hour before I did, and left Sam, Nelson, and myself alone. When Simon left he went back towards Vaughan's, a south-east course. I followed after him and overtook him about half a mile from the place where we drank at.

"Simon, slave, proved that he belonged to widow Lark, had a wife at Richard Blan Vaughan's, and was there on the Sunday that Sam, the slave of R. H. Spann, was last seen alive. Nelson and House's Lewis came there, then Andrew. Harkless was there, had a wife there. Haynes' George had come there the night before. Witness had a son named Bob, nick-named Pinn. He proposed to go up into the cedars, and they started. Nelson and Lewis left and went out of the yard south to the road. Witness, Harkless, Andrew, George and Pinn went out west through the spring lot. At the getting over place at the road, they met Sam who turned back on the road west, and Nelson overtook them one hundred and fifty or two hundred yards on beyond the church, and

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they all went on together perfectly friendly. At the distance of about one and a half or two miles, they turned out of the road, went about fifty yards and stopped. Sam, the deceased, Harkless and witness then went to Forbes', about four hundred yards off, to get whiskey. They got a quart, witness had a tickler, and Harkless a bottle; these vessels were filled. Sam then got from Forbes a glass as near full as he could carry it; Harkless first drank out of the glass; witness drank out of the glass, and handed it to Sam, who drank nearly all that was left, and threw the balance out. They remained at Forbes' about fifteen minutes, and then returned to the negroes they had left and found them in the same place. They drank up all the whiskey, and whilst they were drinking, Vernon's Sam, Haynes' Jack, and Johnson's Charles came up. They did not come through the field, they came through the woods from the direction of the road, or from Rachel's house. Andrew was there until all the whiskey was drank up. He was there whilst they went after the whiskey, and after they came back, and until all the liquor was gone. Andrew, George, Pinn, Vernon's Sam, Haynes' Jack, and Johnson's Charles all then went off together towards Rachel's house, leaving witness, Harkless, Sam, the deceased, and Nelson together. Witness stayed not longer than five minutes and left. Harkless, Nelson and Sam remained together, they were all there standing up. Nelson whistling the bark from a tree, with a small knife; Nelson and Sam were perfectly friendly and had been so. When he was with them, they were not more than fifty yards from the road, and were at the same place all the time. Heard Sam tell Nelson that he had hurt him at his wife's house. Said that Nelson

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had put something in whiskey that injured him. Nelson said that Sam had been mad with him a long time, but that he had never had any thing against Sam. Witness told Sam to let them old things alone, and nothing more was said whilst he was there. When witness left them, he went to Forbes' to get his bottle filled. Forbes' was in a north-west direction from where they were. From Forbes' he went by Rachel's house; passed on the south side in front of the house, and about twenty yards from the house. Saw no person there or about, except Andrew, standing in the door, talking to one of the girls. He went by there because Mr. Forbes told him that there were two negroes, Vernon's Lewis, and another, none of the original company, standing in the woods not far from Rachel's house, and told witness to go and send them away, for fear that some person might suspect that they were there drinking liquor. Witness went and saw them and sent them away, and then went across the road south, through the woods; got into another road, and went towards Vaughan's. He and Harkless came together about one mile from where he had left them. They were both going to Vaughan's where they had wives. In going from Forbes' to Rachel's he was six hundred yards west of where he left Harkless, Sam and Nelson.

"George, slave, was at Vaughan's on Sunday that Sam was killed. Nelson, Andrew, Harkless, Simon, Pinn and himself all started together; went through the spring lot and met Sam at the crossing place at the fence. They then went along in company. Saw Nelson have a large pocket knife. Came near Forbes' and turned out of the road about fifty yards and stopped. Haynes' Jack, Vernon's Sam and Johnson's Charles came up to

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them. Simon, Harkless and Sam then went to Forbes' for whiskey, whilst the rest remained in the woods where they stopped. When Simon, Harkless and Sam came back, a tickler of whiskey was produced and they drank all around. Witness and Andrew, Vernon's Sam, Haynes' Jack, Pinn and Johnson's Charles all immediately went off together to Rachel's house. When they got to Rachel's house, they all stayed about there until towards evening. Some were in the house, some in the yard, and walking about the house and yard. Did not see Harkless, Simon, Nelson or Sam after he left them as stated. Witness was in the passage between the two rooms of Rachel's house; he and Andrew both left there, and some of the others were nodding about on the fence. When witness and the others broke off from the company in the woods, Harkless, Simon, Nelson and Sam (the deceased) started at the same time in the opposite direction; the direction from which they had come. The last time witness saw them they were about one hundred yards from the place they had drank the whiskey; they were still walking on. The place they drank the whiskey was about fifty yards from the road. Witness did not see Simon pass Rachel's house after he, witness, left them.

"Daniel McClary: Harkless showed me and others the place where he had left Nelson and Sam on Sunday. We went there on the next day, which was Monday. This was about the 26th of April. I saw the leaves worked up as if there had been a scuffle, and found at this place a hat and two pieces of tobacco; the hat in one place and the tobacco a short distance from it. We found Sam between fifty and seventy-five yards from that place; he was lying with his hands thrown

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back and one leg up; he had a cut across the lower part of his belly four inches long; his bowels were partly out and a spelling book had been placed in the wound to keep them in. There was a stab in the left side of Sam, which seemed to go straight into the hollow, and there was a great deal of blood on his shirt from this wound. There was also some cuts upon the back, which were not deep, but seemed to have crossed, and there was some cuts upon the right shoulder, which ran towards the back bone; these cuts were not deep, extending through the skin. We found Sam some two or three hundred yards from the road, and about the same distance from Forbes' field; he was on the north side of the road. The road run east and west, and was about one quarter of a mile from Rachel's house, which is on the North side of the road. In going from the place where Sam was found, direct to the house of Hyde, his master, you will go south of negro Rachel's. There is a path going around by Forbes' field, west of Rachel's. The place where Sam was found is in Rutherford county. The negro, Harkless, belongs to me. Sam had no knife about his person.

"John Nance: I was one of the jury of inquest upon the body of Sam, the deceased. I saw no knife about him. Was stript and cut across his bowels, some three inches. Was cut across his shoulders, and was stabbed under the left shoulder, to his hollow, and a great deal of blood was seen upon his clothes, from his wound; and there was also some cuts upon his back. There was dirt upon the hands of Sam.

"Mr. Robertson: I saw Sam, the deceased, at the time the jury of inquest was held, he had a cut across his bowels some three, four or five inches long. These

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was a spelling book placed in this wound. There was a stab which went to the hollow below the shoulder blade; there was a cut on the left side of the back, and also cuts on the right side of the back.

"Bird Spann, saw Nelson when he was arrested on Monday, at the house of Mr. Hyde; he had a good deal of blood on his leg.

"W. B. Hudson, proved that he was at the corn-shucking at Blankenship's, two years ago last fall. Was in the yard where Nelson and the negroes were when Wm. H. Blankenship came out. Witness took Nelson's knife from him; he had it in his hand behind him. Nelson made no resistance, but gave it up.

"Kinchen, slave, lived last year at Mr. Jones'; remembers the Sunday that Sam was killed. Saw Nelson going home that evening; had blood on his shirt bosom; more on one leg of his pantaloons. His coat was torn from the skirt up the back to his shoulders. There was dust on the back of his coat upon the shoulders. There were two scratches, near each other, on one side of his face, just beneath one of his eyes, and there was some blood coming out of them. One of his eyes was swelled. Said that the dirt on the back of his coat looked like he had been wallowing. Said there was dust on his back. Was examined in this cause once before for the State, and did not tell about the coat being torn and dirt upon it, for the reason that he was not asked the question. He belongs to Mrs. Jordan, the sister of H. B. Hyde, the owner of Nelson. It was agreed by the counsel, that this witness was brought to the present term, sworn and put under rule by the State, but not examined on behalf of the prosecutor.

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"Henderson Hyde, proved that he is the son of H. B. Hyde, the owner of Nelson. That Nelson came home Sunday evening of the day before Sam was found killed. Witness saw him attending to his ordinary business; was fifteen or twenty steps from him, and saw the blood on one leg of his pantatoons. Witness says that next morning Nelson went to work in the cotton field. When Spann and others came to arrest him, witness went to the field and brought Nelson to the house. Saw some scratches beneath one of Nelson's eyes; his face was a little swollen, and over one of his eyes there was a sign of a blow; the blood had come out of a slight wound at the point, and had congealed on the brow. Witness did not see his coat. Nelson assisted about baling the cotton. There were several knives procured for the purpose, like shoemakers' knives, and Nelson had a knife of his own besides. Nelson made no attempt to evade or to get away. Witness knew Sam; was in the habit of weighing men about his father's gin, and believed, from size and appearance, Sam would weigh about one hundred and seventy-five pounds.

"Frank, slave, knew Nelson and Sam both. Sam was about twenty-five or thirty years old. Heard Sam say that if ever he caught Nelson off from home he intended to beat him nearly to death with a stick. He intended just to leave life in him. That Sam was the younger and stouter man. Sam said that Nelson had hurt him; he did not know how Nelson had done it, unless he had put something down so that he, Sam, had walked over it; that Sam said he had been in bad health through the winter, but was getting over it. This conversation was in March last. I was not examined in this case in the last trial. My mistress is the sister of H.

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B. Hyde, and I first told one of his negro men of what Sam told me.

"Claiborne, slave, knew Sam and Nelson, both. Heard Sam say, fall before last, that Nelson had tricked him, and the first time he caught him in his neighborhood, or from home, he would whip Nelson, or Nelson should whip him. Says that he told Blankenship, that he never heard Nelson threaten Sam, but he did not tell him that he never heard Sam threaten Nelson.

"Pillman, slave, proves that he heard Sam, the deceased, say that he intended to whip Nelson the first time he caught him from home. Sam said he would beat Nelson because Nelson had hurt him, by laying something down for him, Sam, to walk over. Says that he never did tell Blankenship that he never heard Sam threaten Nelson; but he told him that he never heard Nelson threaten Sam.

"Smith, slave, heard Sam say if he ever caught Nelson from home he would whip him. I never told this till my master, H. B. Hyde, asked me about it.

"The State then recalled Blankenship, who stated: I asked Claiborne and Pillman if they had ever heard any threats made by Nelson against Sam, or any threats made by Sam against Nelson, and they both told me they never had heard any threat made by either of them against the other."

The defendant, by his counsel, offered the examination of the defendant, and the other witnesses taken before the justice of the peace, who committed Nelson; to the reading of which the State objected; the objection was sustained, and the evidence excluded, to which defendant excepted.

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During the examination of the witnesses on behalf of the State, and before they had all been examined, the court adjourned for dinner. Whereupon, all the remaining witnesses for the State, as well as the witnesses for the defendant, were all permitted by the court to disperse; all the witnesses in the cause having been sworn and put under rule at the commencement of the trial. Some of the State's witnesses had been examined and discharged. As the witnesses were permitted to disperse, by order of the court, without the consent of defendant, his counsel having left the court room, as the court was in the act of adjourning. When the court met after dinner, the witnesses were again put under rule, and the prosecution proceeded to the examination of their witnesses in chief. Defendant objected to the introduction of any more of the witnesses on behalf of the State, for the reason that they had been allowed to disperse, to get their dinner, at the adjournment for dinner. The court overruled the objection, and permitted the witnesses to be examined, to which the defendant excepted. The court directed the officer having charge of the witnesses, to state to them not to have conversation with any body upon the subject of the trial, and to convene the witnesses immediately after dinner under the rule. The witnesses were permitted to get dinner.

"Among other things unexcepted to, the court charged the jury that this defendant was indicted for the commission of the offence of murder, and that murder was the unlawful killing of a reasonable creature, in being with malice aforethought. That malice was a necessary ingredient in murder. That murder could not exist with-

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out malice aforethought. The Court further stated to the jury that malice was not always a particular spite or animosity to the person injured, but that it was evinced by that frame of mind which showed that a man had a heart regardless of social duty, and fatally bent on mischief; it is evidenced by that disposition which never hesitates, for the slightest injury, to inflict the severest punishment; in short, that whenever any man committed upon another, any cruel, deliberate, wicked act, that in contemplation of law, it was malicious; and that whenever a killing was proved, the law presumed the killing to be malicious, and the party killing will be held to the guilt of murder; then, if you shall find from the testimony in this cause, that Nelson, the defendant, killed Sam, as charged in the indictment, the law presumes the killing to be malicious, unless the testimony in the case, either on the part of the accused or the government, rebutted the presumption of malice arising from the act of killing, and mitigated the killing to manslaughter, or excusable homicide. The court further stated to the jury, that malice of the description to constitute murder, was of two kinds: express malice; and malice implied in law. Express malice, was when one man formed a deliberate design to take the life of another; that it was evidenced by antecedent menaces, former grudges. Implied malice, was that description of malice which was presumed, or deduced from the nature of the weapon used; if the weapon used to effect a killing, was one of a dangerous character, likely to inflict death, or produce great bodily harm, then the law attached malice to the act from the weapon used, and it would constitute implied malice. The court further stated to the

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jury, that no word, gesture, or provoking conduct, short of an assault, would reduce a killing from murder to manslaughter; nor would every trivial or slight assault do it, especially if the party killing used a deadly weapon. The court further stated, that an assault would reduce a killing from murder to manslaughter. The court further stated to the jury, that manslaughter was the unlawful killing of another without malice, either express or implied, upon a sufficient legal fear. Then if one man, upon a reasonable or legal provocation, under the influence of heat or passion, kill another, it will be manslaughter; but if the provocation does not induce heat or passion, it will not be manslaughter; for, to constitute manslaughter there must be both passion and provocation. If one man attack another by assaulting him, or offering him some indignity, such as would likely produce passion, and upon the provocation thus given, under the heat of blood and passion, thus aroused, he draws upon him a deadly weapon, and slays his adversary, it will be manslaughter. If you shall find from the testimony, that Sam assaulted Nelson, by attacking him, and thereupon Nelson drew his knife and slew him under the influence of the heat and passion produced by the assault and attack, then Nelson would be guilty of manslaughter, and could not be convicted under this indictment. If, though, high words, and a quarrel ensued, without any assault, and Nelson drew his knife and killed Sam, then he would be guilty of murder; or, if they went out to fight upon terms of equality, and thereupon Nelson took some undue advantage, and commenced the fight with a deadly weapon, which he had prepared for the purpose, then he would not be guilty of manslaughter, but his offence would be murder. The

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court further stated to the jury, that before the defendant could avail himself of the plea of self-defense, that he must show that he done every thing that he could do, consistent with his own safety, to avoid the combat before he slew his adversary, and that he took the life of his adversary only to preserve his own life or person, from some great bodily harm. In the language of the old writers upon this subject, 'that he must give back to the wall,' which simply means that he must avoid, if compatible with safety to his person, the attack of his adversary; but if the attack be so sudden, fierce and violent, that he cannot retreat or avoid the attack of his adversary, without exposing his person to the danger of death, or great bodily harm, then he may instantly slay his adversary; or he may even pursue him until he finds himself out of danger, and then slay him, and it will be homicide in self-defense. The court further stated to the jury, that, in considering the testimony of the witnesses, that if there was conflict, or various statements made by them, it was their duty, if practicable, or consistent with truth, to reconcile all the testimony. The presumption of the law was, that every witness would swear truly; notwithstanding this presumption, a trial rarely ever takes place, that the jury are not called upon to separate truth from falsehood. The court stated to the jury, that the conflicts, or various statements made by witnesses, must be of such prominent character as not to be attributed to the want of memory; that if they differ upon collateral and minute facts, such as would likely be attributed to a want of memory, or may consist in matters of opinion in relation to time, or distances, the law ascribes to such variances and conflicts, but little importance. The conflicts to discredit,

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must be to some facts that are too prominent to be ascribed to want of memory, or defect of judgment. It is true, if the jury are convinced that a witness has stated a deliberate falsehood; that is, a fact he knows to be false, the law discards his testimony altogether. The court further stated to the jury that circumstantial testimony consisted of any testimony that was not positive; and that in order to produce a conviction, upon circumstantial testimony, that the testimony must be of so conclusive a character as to exclude any other conclusion than the guilt of the defendant. If the circumstances are of so doubtful a character as to indicate that either of these propositions may be true, then it would not be sufficient to convict."

The jury returned a verdict of guilty of murder in the first degree, and the court rendered judgment accordingly, whereupon the prisoner appealed in error.

E. A. KEEBLE and J. W. BURTON, for the prisoner.

ATTORNEY GENERAL, for the State.

CARUTHERS, J., delivered the opinion of the court.

The defendant, a slave of H. B. Hyde, was indicted and convicted in the criminal court of Rutherford county, for the murder of Sam, a slave of Richard H. Spann.

Various objections are here urged as errors in the proceedings below.

1. Pending the trial on the adjournment of the court for dinner, before the close of the proof of the State, the court permitted the witnesses to be discharged from

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the rule under which they had been placed, and allowed them to disperse until the meeting of the court, when they were again put under the rule. The officer having them in charge was directed by the Judge to caution them against talking with any one on the subject of the trial. The defendant's counsel had left the court house before this order was made, and consequently did not either consent or object. When the examination of the witnesses was resumed after dinner, the defendant objected on the ground above stated, and the objection was overruled by the court, to all which there is exception.

We are not aware of any rule of practice that would make this error. The practice of examining the witnesses separate and apart from each other, at the request of either party, is invaluable in many cases for the ascertainment of truth, and the detection of falsehood. Such has been the experience of wise men in all ages, from the days of Daniel, that divinely-inspired Judge, down to the present time. By our practice, it is the right of parties to demand of the court an order that the witnesses shall not hear each other examined, or shall be kept together, which is called "a rule," or "putting the witnesses under a rule." But whether they shall be locked up and not permitted to disperse under any circumstances, or be ordered to keep out of the court house, we think depends entirely upon the sound discretion of the judge, governed and regulated by the circumstances of each particular case. It would be a very oppressive exercise of this discretion to keep them confined and not permit them to eat or disperse for any purpose, during a long trial, without some very strong cause appearing in some tangible form. On the other hand, this discretion should not give too loose a reign to the witnesses, against

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the consent of the parties, so as to defeat the great object of the rule. But all this we think, from the necessity of the case, must be left to the discretion of the circuit judge, and it would be very dangerous for this court to undertake to regulate him in such matters of practice, unless some plain rule was prescribed in the authorities, or laid down by the legislature on the subject.

If the circuit judge were to deny the rule altogether, or so practice upon it as to make it inoperative in the face of an express objection of a party, then it would probably amount to error sufficient to authorize the granting of a new trial, because it would be the denial of a right to the party demanding it, that might be very fatal to his cause. But we see nothing in the case before us for which we can reverse, in accordance with these principles.

2. The next objection taken is, that the court refused to allow defendant to read the record made by the committing magistrate under the act of 1715, ch. 16, Car. N. 426, of his own examination, and the testimony of the witnesses. There is no error in this. The defendant certainly was not entitled to his own statements, made before the magistrate or any where else, as evidence for himself. He is not bound to submit to it, if he chooses to object, and so the accused ought to be instructed by every committing court. It is rather intended by the statute, as a privilege to him, that he may be "allowed to speak for himself." He may clear himself of suspicion by developing a state of facts, or unravelling mysteries that will lead to a clear manifestation of his innocence, and to his discharge. But it certainly was never intended that he should seize upon this privilege to

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manufacture evidence for himself to be afterwards used on his trial.

But the court also rejected the examination of the witnesses in the case. This presents a more doubtful question; but we think upon principle, the exclusion was right in the state of facts then existing. We think the only ground upon which such examination could be introduced, would be to discredit some of the same witnesses who had been examined in the pending trial. But in order to make this legal, it would be necessary first to interrogate such witness as to what he may have said before the magistrate, that he might have a chance to set himself right, if he can. We are not aware that this question has been adjudicated before, but it must be governed by the same principle that has been uniformly applied to the case of the impeachment of a witness, by proving that he has made statements to other persons in conflict with those made on his examination in court.

The rule is, that this cannot be done, unless he is first particularly interrogated as to such anterior statement. This is absolutely required to make the contradictory evidence legal. The same rule must govern this case; there is no reason for a distinction; as then, no witness was asked what he had said or sworn in his examination before the committing court, that could not be read to contradict or impeach him, which is the only purpose for which it would be admissible. It is true that what a witness swore before a magistrate or court, may be proved as evidence in the event of his death. But this is on another and distinct principle.

3. It is next contended that the court erred in the rejection of evidence to show the explanation of the defendant of the fact that he had blood upon him a short

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time after the homicide occurred. The witness for the State proved that he met the defendant at the junction of a path coming from the direction where the body was found, and the road which he was going, some hundred yards from the body, and probably but a very short time after the killing, and saw blood upon him in several places. He said the prisoner then and there gave him some explanation about the blood. The attorney general objected to the question of defendant's counsel, calling for such explanation. The objection was sustained and the evidence rejected. A party cannot be allowed to make evidence for himself, and nothing that he can say will be received as evidence for him unless it constitutes a part of the transaction, the *res gestæ*. Does this fall within that exception? We think not. Declarations are not admissible as part of the *res gestæ*, unless they were made at the time of the act done, which is under investigation, and which they are calculated to characterize; they must so harmonize and be connected with the act done, as to constitute a part of it. The declarations offered in proof must be contemporaneous with the main fact under consideration, and so connected with it as to illustrate its character. 1 Greenl. Ev. 124; 3 Con. R. 250; Paige, 611; 8 New. Ham. 40.

So, in order to make any thing said by the defendant evidence for him, it must have been so connected with the fact of killing as to constitute a part of the transaction. For instance, if he had been heard to say anything at the time, and on the ground, in justification, or excuse of himself, it would have been competent proof. But what he said about it, or any fact tending to show his guilt, after the transaction was over, would not be a part of the *res gestæ*. It must be connected with an action

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then transpiring. That was not so here. The deed was done, the bloody tragedy closed, and the defendant some distance from the fatal battle ground. There is no authority extending the principle so far, and the declaration of defendant was properly rejected.

4. Objections are taken to the charge of the court. We have read it over very carefully and consider it a correct exposition of the law as far as it goes. It is not defective on the points insisted upon in argument. It would have been more perfect, if the court had explained to the jury the effect of the reconciliation and subsequent friendly relations of the parties, upon the previous threats that had been proved. Former grudges and threats evince the existence of express malice as charged by the judge, but their force and effect to show the existence of malice at the time of the killing, would certainly be impaired by time and subsequent reconciliation and friendly relations. To what extent this effect would be produced, would of course be a question for the jury. It was due to the defendant, to present this view of the case to the jury. And it would also have been proper for the court to have embraced in his charge, the familiar principle of criminal law, that where there is an old grudge, and a fresh legal provocation, the killing will, if the circumstances permit, rather be attributed to the recent provocation, if it be a sufficient one, than to the old grudge. As there was no human eye looking upon this transaction, and none but the accused could know the circumstances attending it, the jury would have to judge from the facts proved, whether the case was manslaughter or murder. They could have no difficulty, under the proof in this case, as to the fact of killing, but whether it was done upon malice or

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passion, so as to make a case of manslaughter or murder, that is, whether the facts proved were sufficient to remove the legal presumption of malice arising from the act of slaying, and the weapon used, and the former threats, would constitute their only difficulty. To come to a conclusion on this question, they would have to carefully weigh the concomitant facts, such as the commencement of the quarrel by the deceased that day, the remark of the prisoner that he had nothing against him, the relative size and strength of each, the appearance of the ground on which they fought evidencing mutual combat, the condition of the clothes and person of Nelson and the deceased, tending to show the same. They would also look to the state of Sam's feelings towards Nelson, as indicated on that day and previously, as circumstances making it probable that he might have made the attack and produced a state of the case that would reduce the killing to manslaughter. We think the charge of the law ought to have been more full and explicit on these points, in a case of life and death, where every thing must depend upon the weight and bearing of circumstances and the strength of presumptions. It is true in general, upon a failure to charge fully where there is no essential point omitted or wrongly charged, it is necessary that it should appear that the party asked for further instructions, and the court refused to give them; but in this case we regard the omission as too important to the life of a human being, to place it upon that ground. We do not say that it would have produced a different result, but it is enough that it might have done so.

Upon the facts as they are presented to us in the bill of exceptions, taken in connection with this defect in the

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charge, we are not willing to consign the defendant to the gallows, without another trial. It may be that the proof is not presented to us as strongly as it was before the jury, but we can only look to and act upon it as it is in the record.

As the case will have to be again tried we will forbear to comment further upon the proof. It is enough for us to say that, as it is written down, it is hardly sufficient to sustain the verdict; and for this reason and because we think the defendant did not have the advantage of a full explanation of the law on the points before designated, we reverse the judgment refusing a new trial and remand the prisoner for another trial.

THE STATE vs. GOSSAGE.

INDICTMENT. *Prosecutor. Selling spirituous liquors to slaves.* Indictments may be preferred without a prosecutor against the person who sells spirituous liquors to a slave in violation of the statutes.

At the July Term, 1852, of the circuit court of Franklin county, DAVIDSON, Judge, presiding, the indictment against the defendant was quashed and judgment rendered accordingly, whereupon P. TURNER, Attorney General *pro tem.*, in behalf of the State appealed in error.

ATTORNEY GENERAL, for the State.

COLYAR, for defendant in error.

[The State vs. Gossage.]

CARUTHERS, J., delivered the opinion of the court.

The defendant was indicted in the circuit court of Franklin county for selling spirits to a slave, at the March Term, 1852, and at July Term, 1852, the indictment was, on motion of defendant, quashed, upon the ground that there was no prosecutor marked upon it. Appeal in error to this court by the attorney general.

There must be a prosecutor marked on all indictments, except there be some statute changing the law as to a particular offense, or class of offenses. Many such laws have been enacted, founded upon the reason that it is more important to the community to suppress certain unlawful practices, than it is dangerous to the citizen to be called to answer a criminal offense without the endorsement of the charge by a prosecutor; and for the additional reason, that experience demonstrates that it often happens that no one will incur the ill will of petty offenders by instituting a charge against them as prosecutors.

The case of selling spirits to a slave without a permit from the owner, the most odious and mischievous of all the minor misdemeanors, is one of the cases the legislature has singled out as a proper one for the application of this principle. We do not think the case is covered by the Act of 1846, ch. 90, § 3 or 11, so as to fall under the 13th section of that act, by which the attorney general is permitted to file indictments *ex officio*, upon the construction of which act the argument in this case has been made. But by the 11th section, all the acts before passed prohibiting sales to slaves, are expressly preserved from repeal by implication. Among these is the Act of 1842, ch. 141; Nich. Sup. 135-6. In the 3d section of

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this act, it is expressly provided that "no prosecutor shall be necessary" on indictments for this offense.

The judgment of the circuit court will therefore be reversed, and the case remanded for further proceedings.

HOGGATT, trustee, &c., vs. WHITE.

CONSTRUCTION OF WRITINGS. *Ante-nuptial contract.* M. F. Dickson, in contemplation of marriage with Henry Baldwin, made a conveyance of all her property to a trustee, to secure the same to her sole and separate use, in which it is provided that she "shall have full power and authority, by her direction in writing, under her hand, in the presence of one or more witnesses, to alienate, sell, dispose of or invest the negro slaves, debts, money or other property, in any way or manner she may think proper; and also, to bequeath or devise the same by her last will and testament, with the power, from time to time, to appoint any other trustee, or agent, for the management of said negroes, debts, and other property. It is further agreed, by the parties to these presents, that the said negroes and their increase, shall remain in the possession of the said Mary F., or in the possession of any one she may choose; and that she may, by her directions in writing, as aforesaid, or otherwise, appropriate as she may think proper, the hire or labor of the said negroes, or their increase, and also the interest and profits arising from the monies due her from time to time, and at all times hereafter, and that she may dispose of said negro slaves and their increase, and of her monies, debts due to her, and other property, by any deed, or deed of gift, or other mode of conveyance, according to her own wishes and pleasure." Held, that under this instrument Mrs. Baldwin retained the power to dispose of the property as she might choose, and having this unrestricted power, she could execute a mortgage.

RES JUDICATA. B. executed a mortgage of a slave to W., to secure the payment of a note for four hundred and seventy dollars, bearing interest at the rate of *ten per cent. per annum*. When the note became due, W. filed a bill in the chancery court to foreclose the mortgage. The chancellor dismissed the bill upon the ground of the illegality of the contract sought to be enforced. Held that this decree was no adjudication of the right of W., as mortgagee to the possession of the slave.

MORTGAGE. *Usury.* Where property is conveyed by a mortgage deed, to secure the payment of money advanced upon a usurious agreement, the mortgagor may, upon payment of the principal debt, with legal interest thereon, recover back the property.

[Hoggatt, trustee, &c., vs. White.]

This action was tried upon the facts stated in the opinion, at the March Term, 1852, of the circuit court for Williamson county, MANEY, Judge, presiding. There was judgment for the plaintiff, and the defendant appealed in error.

FIGURES, for plaintiff in error, argued that the antenuptial contract only retained for Mrs. Baldwin the power to sell, &c., in writing, &c., under her hand, in the presence of one or more witnesses, and the mode indicated in which the power must be executed, should be strictly complied with, and cited 17 Ves., 454; 4 Kent, 330; 4 Yerg., 375. He also insisted that the decree of the Chancellor was decisive of the defensive matter offered by the defendant in error.

EWING & COOPER, and CAMPBELL and FOSTER, for defendant in error.

HOUSTON, special J., delivered the opinion of the court.

Mary F. Dickson, in contemplation of marriage with Henry Baldwin, made a conveyance of all her property to the plaintiff in error as trustee, to secure the same to her sole and separate use. In this conveyance it is provided that she "shall have full power and authority, by her direction in writing, under her hand, in the presence of one or more witnesses, to alienate, sell, dispose of or invest the negro slaves, debts, money or other property, in any way or manner she may think proper: and also to bequeath or devise the same by her last will and testament, with the power, from time to time, to appoint any other trustee or agent for the

[Hoggatt, *trustee etc.*, vs. White.]

management of the said negroes, debts and other property. It is further agreed by the parties to these presents that the said negroes and their increase shall remain in the possession of the said Mary F., or in the possession of any one she may choose, and that she may, by her directions in writing, as aforesaid or otherwise, appropriate as she may think proper, the hire or labor of the said negroes or their increase, and also the interest and profits arising from the monies due her, from time to time, and at all times hereafter, and that she may dispose of said negro slaves and their increase, and of her monies, debts due to her and other property, by any deed or deed of gift, or other mode of conveyance, according to her own wishes and pleasure."

On the 22nd of March, 1847, the defendant lent to Mrs. Mary F. Baldwin four hundred and seventy dollars, and took her note for it, payable on the first of January, 1848, reserving on its face, ten per cent interest; and on the same day, Mrs. Baldwin executed to defendant, a mortgage upon the slave in controversy, to secure the payment of the note. To this mortgage there was no attesting witness. When the note fell due, seventy dollars and some interest were paid upon it. A new note was taken for four hundred dollars, payable in six months, and defendant sent the mortgage to Mrs. Baldwin, with the request that she execute another in its place, which, however, was declined by Mrs. Baldwin.

In 1850, the last note not being paid, and Mrs. Baldwin still retaining the mortgage in her possession, and refusing to execute a new one, Mrs. White filed a bill in the chancery court at Nashville, for discovery, to have the mortgage produced and delivered up, and for its foreclosure for the payment of the note. This bill was

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dismissed by the chancellor upon the ground that complainant was seeking the aid of the court to enforce an illegal contract.

After this, the defendant got possession of the slave, which is one of the slaves conveyed in the trust deed to the plaintiff and was about to sell him under the mortgage, when this suit in replevin was brought for the negro. There was a trial by jury in the circuit court of Franklin, a verdict for defendant, a motion for a new trial, and in arrest of judgment, which being overruled, the plaintiff appealed to this court.

The court charged the jury, "that the Trustee in the ante-nuptial settlement had the right of possession to the personal estate described in the settlement, against all persons except Mrs. Baldwin, and such persons as might rightfully claim under her. That a mortgage executed by Mrs. Baldwin would be good as between her and the mortgagee and her trustee, although without attesting witnesses." It is insisted by the counsel of plaintiff that this part of the charge is erroneous, because Mrs. Baldwin had no power under the marriage settlement, to execute the mortgage. We do not think so. Under the marriage settlement, she has power, "by her directions in writing, under her hand, in presence of one or more witnesses to alienate, sell or dispose of" her property; which means that her directions, so declared, shall authorize the trustee to sell the property. She has also the power "to bequeath or devise the same by last will and testament," and she also has power "to dispose of said negro slaves and their increase, and of her monies, debts due to her and other property, by *any* deed or deeds of gift or *any other mode of conveyance according to her own wishes and pleasure.*" A more unlimited power

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could not be well conceived of or described. She retained all the powers of a *feme sole*, as to the disposition of her property. In our view of the case we do not perceive any repugnance between the first and last provision of the settlement. One is a mode of conveying her property by directions to her trustee, and the other is by her own conveyance. By the one her directions are to be in "writing, under her hand, in the presence of one or more witnesses," and by the other, "any mode of conveyance according to her own wishes and pleasure." But if we thought that there was any inconsistency or repugnance in these clauses, still it is clear, that taking the whole instrument together, Mrs. Baldwin retained the power to dispose of her property as she may choose, and having this unrestricted power to sell or dispose of by deed, deeds of gift or by any other mode, she had power to execute the mortgage.

The court also charged the jury that the matter in controversy was not to be regarded as *res judicata*, because, in the chancery court, the defendant was merely repelled and the question here presented was not decided, that she had the right to defend the mortgage, notwithstanding the decree in chancery, and the fact the ten per cent is mentioned in the mortgage. It is also insisted by plaintiff's counsel that this is erroneous.

The decree in the chancery court recites the facts and states that "the mortgage, although brought into court by the defendant, yet being brought at the instance of complainant, and with a view that it shall be specifically executed for complainant's benefit, must be considered as having been brought forward by complainant, and the complainant must be regarded under this aspect of the bill as seeking the aid of the court upon an illegal con-

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tract. It is therefore ordered, adjudged and decreed that the bill be dismissed." The bare recital of this language of the decree, shows, beyond any sort of controversy, that Mrs. White was repelled from the chancery court, upon the ground of the illegality of the contract, for the enforcement of which she was seeking the aid of the court. She was not heard in court, but simply repelled, and the matters in controversy in this suit are not *res judicata*.

The case is then presented in this only remaining aspect: Mrs. Baldwin, the plaintiff, in reality, so far as the property sued for is concerned, borrowed four hundred and seventy dollars of Mrs. White, and gave her note, bearing interest at the rate of ten per cent, upon its face; and executed a mortgage upon one of her slaves, to secure the re-payment of the money, and she brings this suit against Mrs. White, who has the slave in possession, proceeding to sell under the mortgage, to recover the slave from her, without having paid, or offered to pay, the amount of money borrowed, with legal interest. And we think the case falls within the principles laid down in the cases of *Allen vs. Dodd*, 4 Humph., 132-134; and of *Yerger vs. Rains*, 4 Humph., 259-267. The case would be very different, had Mrs. Baldwin paid the money really due, or were she to file a bill for the slave, offering or tendering the money borrowed with legal interest.

The court will not lend its aid to either party, but will leave them where it finds them.

We see no error in the finding of the jury, or in the charge of the court, and we therefore affirm the judgment.

NELSON vs. EWELL, et al.

WITNESS. *Non attendance of. Penalty. Parties.* The penalty given by statute to be recovered against witnesses who have been summoned at the instance of the accused, in a criminal prosecution, and who fail to attend, can only be recovered in the name of, and for the use of the State.

SAME. *Practice. Parties.* The liability incurred by a witness in default is several in its nature; the remedy to enforce it is against him alone, and it cannot be united with a proceeding against other witnesses in like default.

At the July Term, 1852, of the circuit court of Franklin county, MAROHBANKS, Judge, presiding, there was judgment for the defendants upon their demurrer to the *scire facias*, issued as stated in the opinion, from which the plaintiff appealed in error.

H. L. TURNEX, for plaintiff in error.

WISENER, for defendants in error.

CARUTHERS, J., delivered the opinion of the court.

The defendants were summoned to appear before the circuit court of Franklin, to testify and give evidence in behalf of Javan Nelson, who was indicted in that court upon a charge of murder. The witnesses failed to attend; a forfeiture was taken against them, in the name and in favor of Javan Nelson, for one hundred and twenty-five dollars each. *Scire facias* was awarded thereon, and upon its return, the defendants demurred, and judgment was rendered for the defendants, from which the plaintiff has appealed in error to this court.

1. The Act 1794, ch. 1, § 29, applies only to civil suits, and if a witness, being duly summoned and liable to attend, fail to attend according to the command of the

[*Nelson vs. Ewell et al.*]

subpoena, he shall forfeit to the party that summoned him one hundred and twenty-five dollars.

By the 33d *section* of the same act, a witness in a "criminal prosecution shall appear and attend until discharged by the State or the party at whose instance he shall be summoned; and in default thereof, shall forfeit and pay the sum of two hundred and fifty dollars for the use of the State.

This section applies in the present case. The judgment *nisi* should have been in the name of the State, and for the sum of two hundred and fifty dollars. It is not that any sum is due from the witnesses to either party, but it is a penalty to enforce his attendance. If the witness be summoned for the accused and fail to attend, he incurs the penalty, and it is the duty of the attorney general, in a proper case, to enforce it.

It is a higher penalty than that which is imposed in a similar case in a civil suit, for the reason that the public justice and the defense of the accused, are of greater importance than any matter of mere private property. It is not to the interest of the public or the accused, as has been argued, that the penalty be paid to him. It is his interest and his right "to have compulsory process for obtaining witnesses in his favor;" Con. Art. I, § 9. This he has by the subpoena, and the attachment for contempt, to which he is entitled. It is the latter proceeding only that can enforce the attendance of the unwilling witnesses. The penalty is only a loss and inconvenience that he incurs in case of failure to attend.

The court and not the accused should have control of this penalty, the better to enforce upon the witness obedience to its summons, for that is the only object intended to be attained. If the penalty were under the control

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of the accused, we might suppose many cases in which it would result in inconvenience and public prejudice. But we need go no further into this matter, for we think that the construction and policy of the statute are equally evident and proper.

2. This proceeding is also defective in *practice*. The liability incurred by a witness in default, is several in its nature; the remedy to enforce it is against him alone, and it cannot be united with a proceeding against other witnesses in like default. It is a case of misjoinder. *State vs. Lacy*, 3 Humph. R. 225.

Let the judgment be affirmed.

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CORN and wife, vs. BRAZELTON.

HUSBAND AND WIFE. Declaration. Replevin. In an action of replevin against husband and wife, if the declaration aver that both defendants took and detained the property, it will be supported by proof that the wife took and detained it; and so, if the declaration allege that the wife took and detained the property, a judgment may thereon be rendered against both the wife and husband, both being sued.

ARREST OF JUDGMENT. Supreme court. Act of 1852, ch. 152, § 7. The act of 1852, ch. 152, § 7, which declares that the supreme court shall not arrest judgments "for any defect or imperfections in matters of form," applies to all cases brought into the supreme court after the act went into effect, though the suits may have been instituted before the statute was enacted.

SAME. Pleading. Practice. A plea in these words: "Def't plead not guilty," though but the mere name of a plea, and might be treated as a nullity, yet, if the plaintiff take issue thereon, it is a waiver of the objection, and the judgment will not, because of the defectiveness of the plea, be arrested.

[*Corn and wife vs. Brazelton.*]

The judgment in this case was rendered at the July Term, 1851, of the circuit court for Franklin county, for the plaintiff, and the defendants prosecuted a writ of error.

COLYAR, for plaintiffs in error, cited Bac. Abr., Baron and Feme, L; 7 Humph., 236, 255.

CARTER and H. L. TURNER, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

The action is replevin for two negro slaves. There was judgment for the plaintiff, and defendants have appealed in error to this court. The question is, did his honor, the circuit judge, err, in overruling the motion in arrest of judgment? It is argued that he erred.

First: Because the declaration is defective.

Second: Because the judgment is joint, against two, when only one of the defendants pleaded to the action.

The declaration states, that "Benj. W. Corn and Elizabeth, his wife, were summoned to answer Daniel Brazelton of a plea, wherefore they took the slaves of Daniel Brazelton, and unjustly detained," &c. It avers, "that the said Elizabeth A. Corn, on, &c., took the slaves, money, &c., and unjustly detained the same," &c.

Now, the declaration is defective in this: It does not aver that the slaves were taken and detained by the said defendants. The averment refers to one of them only. But as the wife could not take and detain the slaves for herself, for her possession would enure to the benefit of her husband; and as he is liable for the act of his wife in wrongfully taking and detaining the slaves, it is a legal

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conclusion from the facts stated, that the husband is liable in the same manner as if he had done the act himself. If the averment were that both defendants took and detained the slaves, it would be supported by proof, that the wife took and detained them; for the husband is liable for the wrongful acts of his wife. The objection, therefore, is merely formal, and that is no longer a reason in arrest of judgment, in the supreme court. Act, 1852, ch. 152, § 7.

This statute is imperative, that this court shall not arrest a judgment "for any defect or imperfections in matters of form;" which, by law, before this amendment, was sufficient cause in arrest. It applies to all cases from the time it went into effect, though the suits may have been instituted before the statute was enacted. For, its terms are general, and apply to every case alike. It affects no rights, but relates exclusively to the remedy, and declares, that, "*hereafter*," a defect, in matter of form, shall be no cause in arrest of judgment in this court.

It is further objected, that there is no direct averment in the declaration, that said Elizabeth was the wife of Benj. W. Corn. We think, however, that the averment is in substance, made, though informally. And if the fact were not true, it was matter in abatement.

As to the plea, it is in these words: "Def't plead not guilty;" on which the plaintiff joined issue, and there was a verdict that the defendants were guilty. It is the mere name of a plea, and might have been stricken out by the court, or treated as a nullity; but it is taken by the plaintiff instead of a plea, or as a valid plea, and that is a waiver of the objection. But it is said to be the plea of one defendant, only.

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If this were so it would vitiate the judgment, which is rendered upon a verdict against the two defendants. It was treated by the parties as the plea of both defendants, and that is the fair construction.

The objection is a mere verbal criticism, not to be favored; but if that were the test, then the word plead is in the plural form, and applies to both defendants. Judgment affirmed.

BLANTON vs. VANZANT.

USE AND OCCUPATION. *Tenants in common. Parties.* Where one of several tenants in common is in the use and occupation of land, all his co-tenants must join in an action against him to recover rent; one cannot sue alone for his interest.

SAME. *Same. Action. Assumpsit.* The action of assumpsit is the proper remedy to recover rent due from one tenant in common to his co-tenants.

This was an action of assumpsit in the circuit court of Franklin county. To the plaintiff's declaration the defendant demurred, and the demurrer being sustained, the plaintiff appealed in error.

CARTER, for plaintiff in error, cited 1 Pick. 224; 5 *Ibid*, 290; 9 *Ibid*, 614; 12 *Ibid*, 120; Bac. Abr. Tenancy; 1 Swan, 385.

COLYAR, for defendant in error, cited *Parker vs. Elder*, 11 Humph. 549.

[Blanton vs. Vanzant.]

TOTTEN, J., delivered the opinion of the court.

The action is assumpsit for the use and occupation of land. The defendant demurred to the declaration, and the judgment thereon being in his favor, the plaintiff has appealed in error to this court.

The case is this: Isaac Vanzant died, seized of a tract of land, on which there were valuable improvements, and the same descended to his children, ten in number, his heirs at law. The plaintiff's wife and the defendant are two of said heirs, and as such, have an interest in the land. The defendant was in the exclusive use and occupation of the land and premises for the year 1849, by mere permission of the other heirs, without any contract except that which the law will imply.

Now this action is instituted by one of the heirs to recover his portion of a reasonable rent for the use and occupation of the premises; and the question, whether one of several tenants in common, can maintain an action against another, in such case without joining the other tenants as plaintiffs in the action.

At the common law, one tenant in common, could not, in general, maintain an action *ex contractu* against a co-tenant. He could not maintain an action against a co-tenant for a portion of the rent, or for use and occupation, which is of the same nature. His remedy is by bill in equity. But in the case of a personal chattel, or of timber severed from the land, if one tenant in common, by a sale thereof, convert the thing into money, the joint interest is severed, and he is liable to the other in an action for money had and received. *Wheeler vs. Horn*, Willes' R. 208; *Martin vs. Knowlly*, 8 Tenn. R. 145;

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Miller vs. Miller, 9 Pick R. 34; *Sherman vs. Ballowe*, 8 Cowen R., 314.

While the relation of tenancy in common continues, each has the same right to the possession and the rents and profits, as the other. The possession of the one is the possession of the other; and therefore, Mr. Kent says the mere occupation of the premises by one joint tenant or tenant in common, would not of itself, at common law, have entitled his co-tenant to have called him to an account. He must have stood in the relation of a bailiff or receiver, in order to be rendered responsible. But the statute, 4 Anne, ch. 16, rendered joint tenants and tenants in common liable in account as bailiffs, for receiving more than their just share. 4 Kent. Com., 369.

The statute entitled, "an act for the amendment of the law and the better advancement of justice," was in force in North Carolina, (vid. Judge Martin's Collection of English Statutes, 394,) and we consider that a number of its provisions, including that before cited, are in force in this State. This statute gives the remedy at law; without it, the remedy was only in equity during the continuance, as here, of the tenancy in common. The action of account is an absolute remedy, and is entirely superceded by other actions, and principally by the equitable action of assumpsit. The action of assumpsit is the proper remedy in the present case; but as the tenancy in common still continued to exist, and the defendant held possession of the premises in his character of tenant in common, it must follow that he is liable to the joint action of his co-tenants, who have an interest in common in the premises. The remedy must conform to the nature of the right; and as that is a joint interest, so the remedy must be joint. The

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possession of defendant was no ouster of his co-tenants, but consistent with their common rights; and it is very clear that unless there has been a severance of the common interest, no action between the parties in relation to it, can be several.

The case of *Parker vs. Elder*, 11 Humph. R., 546, is different from this, in many respects. In that case, several had a joint interest in a fund in the hands of the defendant; one of them was paid his share, and that was held to be a severance of the joint interest in the fund, so as to entitle the others to a separate remedy.

But here the joint interest continues; no act of severance has been done; and it must follow, that the remedy to enforce it must be joint.

Let the judgment be affirmed.

HUFF vs. THE STATE.

GAMING. *Horse racing.* Betting upon a horse race which is not run upon a path kept according to the statutes for the purpose of turf racing, is an indictable offense. A race path, within the meaning of the statutes which legalise horse racing, is such as is kept under a license, and the payment of an annual tax to the State.

The defendant was presented for the offense of gaming, and upon the facts stated in the opinion, was convicted, and judgment accordingly rendered against

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him in the circuit court for Giles county, at its April Term, 1852, MARTIN, Judge, presiding; whereupon he appealed in error.

JONES and BROWN, for plaintiff in error.

ATTORNEY GENERAL, for the State.

CABEUTHERS, J., delivered the opinion of the court.

The plaintiff in error was indicted and convicted for betting on a horse race in the county of Giles. The circuit court overruled a motion for a new trial, and appeal in error to this court. It is insisted that the facts do not make out a case of gaming, but that it falls under the exemption of the acts of 1820, ch. 5; and 1833, ch. 10, § 1. The first act excepts betting on "turf racing," from the penalties of gaming. In consequence of some uncertainty in the meaning of this term, the Legislature, in 1833, gave a definition of turf racing. They say: "All horse racing, without regard to the distance which may be run, where the same is run upon a tract or path, made or kept for the purpose of horse racing, shall be deemed turf racing."

Before this statutory definition, a turf was understood to apply, only to a tract at least one mile long. But the legislature have the power to make or change the meaning of words as they please; their definitions are binding on all, and cannot be gainsaid. So, betting on a turf race, according to this definition, is not indictable. Was this race run upon a "tract or path, made or kept for the purpose of horse racing?" We think with the court and jury below, that it was not. The

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proof shows, that it was a tract made and kept up occasionally, by the neighbors, in a field of defendant's, and only so kept and used when they would make a race for their own sport. It was not a tract kept for regular periodical racing. These kind of tracts can only be kept under license, and the payment of an annual tax to the State, as for a "privilege," of one hundred dollars; Act, 1848, ch. 161, § 9. The words are: "Upon the privilege of keeping a tract for turf racing, one hundred dollars." Now, it would seem inevitably to follow, that if this were such a tract, as is defined by the act of 1833, and which it must be, to exempt the defendant from the offence of gaming, then he is liable to the severe penalties of the revenue laws, for keeping it up for racing, without taking out license for the privilege. This is an evil and corrupting practice, promoting idleness and dissipation, poisonous to public morals, and ought to be suppressed. Remove the stimulus of betting, and the practice will cease.

We have examined the charge of the circuit judge, and consider it, taken altogether, an exposition of the law on the subject, which is substantially correct.

The judgment will be affirmed.

LOUISVILLE AND NASHVILLE BRANCH TURNPIKE COMPANY vs.
NASHVILLE AND KENTUCKY TURNPIKE COMPANY.

CORPORATION. *Charter—construction of.* The fifth section of the charter of the Nashville and Kentucky turnpike company, provides that the company “may establish toll gates, not exceeding seven in number, at such points as the directors may designate.” Under this provision, the directors have power to establish any number of gates less than seven. And though the charter of the company confers and imposes the same rights and duties as those stated in the charter of the Franklin turnpike company, (the seventh and tenth sections of which charter limit the number of gates to two for the first seven miles, and to one at and for every succeeding five miles,) yet as the provisions of the two charters are dissimilar and inconsistent, with reference to the location of gates, and cannot stand together, that of the Nashville and Kentucky turnpike company must prevail.

SAME. *Discretionary power conferred upon the corporators—how determined.* Where the charter vests the corporators with discretionary power in reference to the exercise of a particular right, and in the exercise of the discretion so conferred they make an election, this election is final and conclusive. Notwithstanding this is so, however, the corporation may, if it choose, abandon the use or enjoyment of the right secured by the election, if no detriment thereby accrues to the public.

This was a bill filed in the chancery court at Nashville, upon the facts and for the purpose stated in the opinion. At the November Term, 1851, there was a decree for the respondent, and the complainant appealed.

TRIMBLE and MEIGS, for complainant.

EWING & COOPER, for respondent.

TOTTEN, J., delivered the opinion of the court.

This bill is brought to abate an alleged nuisance erected by defendants to the prejudice of the plaintiff's franchise. The chancellor dismissed the bill, and the plaintiffs appealed.

These are incorporated turnpike companies. The defendant's was chartered in 1836, and the road was completed

[Louisville & Nashville Branch Turnpike Co. vs. Nashville & Ky. Turnpike Co.]

and toll gates erected thereon, denominated 1, 2, 3, 4, 5 and 6, before the plaintiff's was chartered in 1846.

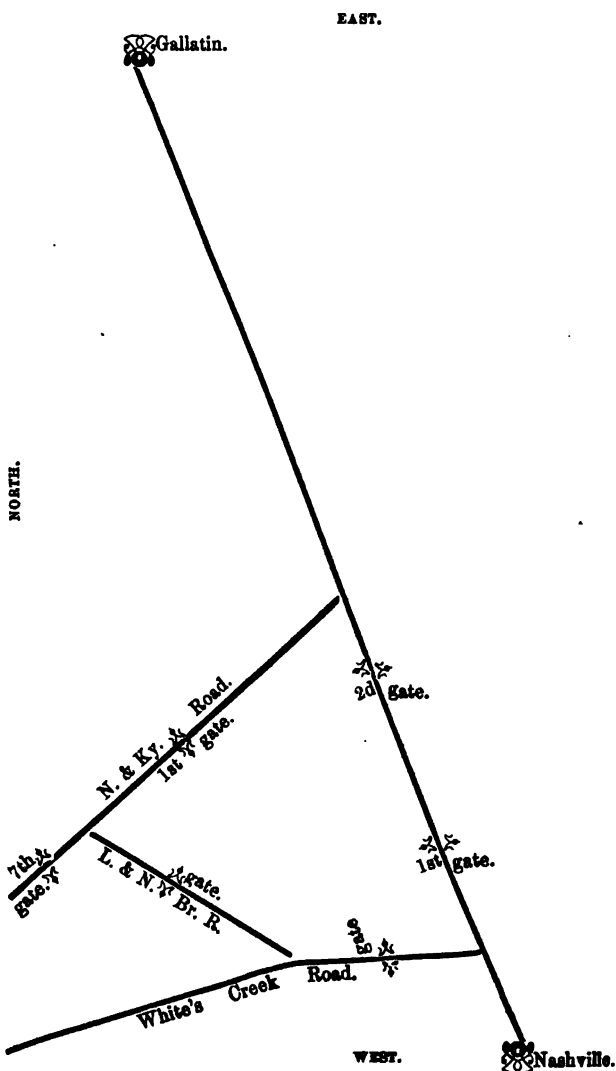
The defendant's road intersects with the Gallatin and Nashville turnpike road, at a point ten miles north of Nashville. From this terminus north one mile, is gate No. 1; then at four miles from No. 1, is gate No. 2; at four miles further is gate No. 3. In 1846, gate No. 3 was consolidated with gate No. 2, and toll taken at No. 2 for both, from persons liable to pay at both.

The plaintiff's road is ten miles long, extending from White's creek turnpike, with which it intersects, in a northerly direction, to defendant's road, and intersects it at a point two miles from its southern terminus. From this point to Nashville it is twelve miles on either road, the distance being the same. The plaintiff has the right under its charter, to erect two gates; it has erected but one; near its southern terminus, coming from there to Nashville, there is one other gate on White's creek turnpike, making two gates on this route from said twelve mile point. On defendant's road is gate No. 1; and then on the Nashville and Gallatin road are two gates, making three gates on this latter route from the twelve mile point to Nashville. The effect of which was, that nearly all the travel quit the defendant's road and went upon the plaintiff's road, greatly to the injury of the defendant.

To avoid this injury, and to place the roads upon equality, the defendants erected gate No. 7, at about one quarter of a mile north of the twelve mile point, that is, north of said junction, and opened gate No. 1. Now there are but two gates on either route from that point to Nashville. But before No. 7 was erected, that is, in 1849, gate No. 1, was removed by defendants, and erected at a point about one quarter of a mile

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north of said junction. It was soon afterwards restored to its former position, left open, and gate No. 7 erected a little further north, at the point before stated. The gate No. 7 is the alleged nuisance, which the plaintiff seeks to abate. See the following diagram:



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Counsel for the plaintiff insists that defendant has no right to erect gate No. 7, that it is, in effect, a mere removal of gate No. 1. That having elected to erect but six gates, and located No. 1 as before stated, the defendant is concluded, and has no power under its charter, to change that election, or to remove any of its gates.

In defendant's charter, § 5, it is provided "that said corporation may establish toll gates, not exceeding seven in number, at such points as the directors may designate." This is a right to which the defendant is entitled. It may erect a less, but not a greater number of gates, as its rights and interests may seem to authorise and require. And so as to the location of the gates; that is left to the discretion of the directory. It is a distinct and substantive provision in its charter, not controlled by the provisions in the Franklin Turnpike Charter, (which is incorporated in this,) on the same subject, as has been insisted upon in argument. The provisions in the two charters in this respect, are not similar, or consistent, and cannot stand together. The defendant's charter confers and imposes upon it, the same rights and duties as those stated in the charter of the Franklin Turnpike, except as otherwise provided for in defendant's charter. The discretion to locate gates is one of the excepted provisions.

As to the election insisted upon, we do not think it applies, as to the number of gates. It is very reasonable to suppose a case, where the whole number permitted, would not be desirable, but only an expense, and render the stock less profitable. And yet, the owners having constructed the road and performed their undertaking with the public, are entitled, should it

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become their interest to do so, to increase the number of gates to the number permitted in their charter. They should not be held to have abandoned their rights because it was not to their interest for a time to use and enjoy them. As to the *location* of the gates, we have seen that defendant has a *discretion* as to that; it may elect in its discretion, to locate them at one point or another.

But the election being made, the discretion is determined, and the gates become fixed and immovable. In such case, the doctrine of election applies in full force. The defendant has been permitted to locate its gates at its discretion; to that it was entitled. But the charter does not permit it to change their location; it is to the interest of the public that they be permanent; and in cases of election the rule is, "if a person once determines his election, it shall be determined forever." Com. Dig., title, "election," ch. 2; Co. Litt., 145, a.; *State vs. Turnpike Co.*, 10 Con. R., 163; *Turnpike Co. vs. Hosmer*, 12 Con. R., 364; *Griffin vs. Horn*, 18 *J. R.*, 397. *16 John. 397.*

But we do not think that the case is a removal of the gate No. 1, but the location of gate No. 7. There is no question that gate No. 7 was erected and located to prevent the monopoly of all the travel on the plaintiff's road. The attempted removal of gate No. 1 was intended to accomplish the same object.

There being now, an equal number of gates on the two roads, the travel will probably be equally divided, and the plaintiff's monopoly will cease. Of this, it has no right to complain, if the defendant had the right to locate gate No. 7; and we have seen, that under its charter, it had that right. It also has the right to open

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gate No. 1., which it probably will continue open, until plaintiff erects its gate, No. 2, which it has the right to do under its charter. For, it is observable, that in its bill it claims this right, though it has elected, so far at least, to erect but the one gate. It considers that it is not concluded by that election, and we think correctly; for it is not a subject, as we have seen, to which the doctrine of election will apply.

Let the bill be dismissed.

WALKER vs. THE STATE.

GAMING. The jury, upon the trial of a defendant charged with gaming, rendered the following special verdict: "We find that the defendant, with some six or more other gentlemen, played at a game called ten pins, or handicap. In this game no one played to beat any other gentleman, but each one had assigned to him a certain number of pins to get, with a certain number of balls, some more and some less, according as they were considered good or bad players. If the player did not get the number of pins assigned him, he was to treat to a bottle of champagne. The defendant did play in this game in Maury county, in less than six months preceding the finding of this presentment, and did sometimes, on failing to get the number of pins allotted to him, treat to a bottle of champagne, and sometimes he did not. It was agreed by the parties at the commencement of the playing, that the treat was a voluntary thing, and no one need to do so unless he was perfectly willing. The jury further find, that the defendant and the other gentlemen engaged in this play, did not believe it to be gaming." *Held*, that these facts constituted the offense of gaming.

Upon the special verdict rendered in this case, and which is set out in the opinion, the circuit court for Maury county, at the May Term, 1852, MARTIN, Judge,

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presiding, rendered judgment against the defendant, and he appealed in error.

M. S. FRIERSON, for plaintiff in error, cited *The State vs. Smith*, Meigs' Rep. 101, as defining gaming, and the following authorities to show that the facts stated in the special verdict do not bring this case within the definition of the offense as stated in *The State vs. Smith*; Sto. Coh. §§ 565-6; 1 Maule & Selwyn, 500; 1 Pothier Obl. §§ 1, 5; 12 Johns. Rep. 190, 397; 2 Kent, 477; 4 Bing. R. 653; 5 M. & W., 82; 2 Humph., 131; 11 Humph. 553.

ATTORNEY GENERAL, for the State.

CARUTHERS, J., delivered the opinion of the court.

This is a presentment for gaming. The jury found a special verdict in these words: "We find that the defendant, with some six or more other gentlemen, played at a game called ten pins, or handicap. In this game no one played to beat any other gentleman, but each one had assigned to him a certain number of pins to be got with a certain number of balls, some more and some less, according as they were considered good or bad players. If the player did not get the number of pins assigned him, he was to treat to a bottle of champaigne. The defendant did play at this game, in Maury county, in less than six months preceding the finding of this presentment, and did sometimes, on failing to get the number of pins allotted to him, treat to a bottle of champaigne, and sometimes he did not. It was agreed by the parties at the commencement of the playing, that the treat was a voluntary thing, and no one need to do so unless he was

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perfectly willing. The jury further find, that the defendant and the other gentlemen engaged in this play, did not believe it to be gaming."

The circuit judge decided that the facts found by the jury made out a case of gaming, and pronounced judgment accordingly. Defendant appealed to this court.

What is gaming? It is defined by the Act of 1799, ch. 8, § 2, to be a playing "at any match or matches at cards, dice, billiards, or any other game of hazard or address, for money or other valuable thing." By the same section to "encourage or promote," is the same offense; and so is betting upon such hazards, by subsequent acts. But this offense being a misdemeanor, all persons who aid, encourage, advise or promote them, would be principal offenders by the principles of the common law, without any statute on the subject.

In the case of *The State vs. Smith*, 2 Yer. 272, the court lay down several rules on this subject, well worth attention, and settle the definition of the offense very clearly. The evils of gaming are there depicted by Judge Catron in their true colors, and are well calculated to impress upon all judges, legislators and good citizens, that it is an important duty to do all in their power to expel it from society, as a practice productive of the most alarming evils, and destructive of the morals of the community. It is not intended to brand this particular case with odium, but the example is the worse because it tends to take off the disgrace of gambling, and engenders a passion for the vice in circles it would never enter, if left to its own low and degraded haunts. But where the livery of gentlemen is thrown upon it, there is no security against its ravages. The most promising youths of the land are taken in its snares, and become victims of the

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absorbing passion. It is the mother of intemperance, idleness, and numberless concomitant evils. It undermines morals, industry and honesty. No man's sons are secure where it prevails in the circles in which they move. Those virtues and habits which lie at the foundation of private happiness and public prosperity, all fall before this fell destroyer. Gentlemen should give no countenance to a practice fraught with such fearful consequences. It stands next to intemperance, which it generally accompanies, in its baneful influences upon society. The legislature, being deeply impressed with the necessity of eradicating this vice, has, from time to time, accumulated these statutes on the subject, as evasions and new devices would spring up. It is not supposed that many, who yield to the indulgence for sport and amusement, and certainly not in the case before us, as appears by the special verdict, have any criminal or unworthy motive, or would do any thing they considered dishonorable. It is often thoughtlessly done, without any just consideration of the baneful consequences. But then it is the object of the law to act upon, and suppress the offense through the offender. In its mandates, it is no respecter of persons, and looks not to the motives.

The only question is: Was this a case of unlawful gaming? We think it very clear that it was. It was a risk of a bottle of wine upon a hazard, whether he knocked down the number of pins designated or not. It was not a bet with any particular individual, but with the whole company. So, the game was to go around from one to another; each was to treat if he failed to come up to the requisition of the assessors, as they were called. It would certainly be gaming, for two or more persons to determine, by the chance of a

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game at ten pins, who should pay the boy for setting up the pins, or who should treat, as much as if the same amount was staked up and won and lost upon the game. All these contrivances are regarded and intended as evasions of the law, and cannot be tolerated. The law is founded on a principle which must be sustained. It prohibits any game, or match of hazard and address, by which something can be obtained for nothing. Any attempt, by artifice, to evade the plain enactment, is regarded by the courts, as an aggravation of the offense. But it is said in this case, that the loser was not compelled to pay, but that it was to be voluntary. This can make no difference; it did not, in the least, change his condition; because, without such an agreement he was not bound to pay, as the law declares all gambling debts void, and not recoverable. The company also agreed, say the jury, that the transaction should not be regarded as gaming, and that the parties did not so consider it. Parties engaged in an unlawful practice cannot change its character by giving it a new name, or by any agreement of their own. The question still remains, how does the law regard it?

The judgment of the circuit court will be affirmed.

[Evans. vs. -Barnes.]

and release the sheriff from his liability, and the property from the custody of the law; in which case, the original owner would have the power to make a valid sale of it. But such waiver must be distinctly and clearly proved. It is not enough to produce this effect, that another *fi. fa.* was issued, which the sheriff re-levies upon the same property, and makes his sale upon it. He had a perfect right to sell, by virtue of the title vested in him by the first levy, without any execution; or, he might have retained the first execution and sold under it during the term to which it was returnable, or after the term, when it was *functus officio*. The issue of an *alias*, or another order of sale, was not necessary to continue his right under the previous levy. Even the taking of a delivery bond, on a levy afterwards made on the same execution, or an *alias*, without forfeiture, would not be a waiver of his title, or a forfeiture of his right to sell under the first levy. Lester's case, 4 Hum., 383. The issuance and use of the last execution was merely nugatory and useless; at least, it did not affect his right to the property derived from his original levy, which related to, and bound the property from the test of the first execution, on the second Monday in July, 1850.

Let the judgment of the circuit court be affirmed.

GUILD *vs.* BALDRIDGE.

MISTAKE. *When money paid under a mistake of facts may be recovered back.* When money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if the fact had been known to the payer, an action will lie to recover it back, and this right proceeds upon the ground that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid has no right either to receive ~~as a debt~~. The party to whom the payment has been made cannot resist the recovery upon the ground of the plaintiff's negligence in availing himself of the means of knowledge within his reach, nor upon the ground that at the time of payment the plaintiff may have entertained and expressed a vague *belief*, resting on no evidence and amounting to nothing like conviction or moral certainty, that the fact existed which would exempt him from the payment, nor upon the ground that the plaintiff had *had* knowledge of the fact, if it has been forgotten, as forgetfulness of a fact is ignorance of such fact; the plaintiff, who has thus paid money, may, however, be repelled upon the ground that injury or injustice would be done the defendant in the particular case, were the plaintiff permitted to recover; e. g. where the money is paid not to the original creditor of the party paying, (whose debt had been previously satisfied,) but to a creditor of his, who received the money in good faith, ignorant of the mistake and in satisfaction of a just demand, and who in consequence of such payment may have waived or lost his remedy against his debtor.

This was an action tried, upon the facts stated in the opinion, at the February Term, 1852, of the circuit court for Sumner county, MANEY, Judge, presiding. There was judgment for the defendant and the plaintiff appealed in error.

GUILD, for himself.

HEAD, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This suit was commenced before a justice of the peace of Sumner county, on the 21st of September, 1850, by Guild against Baldridge, to recover money alleged to

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have been paid by the former to the latter, without knowledge, at the time, of the true state of the facts. The case was taken by appeal to the circuit court, where a trial was had, and verdict and judgment rendered in favor of the defendant.

It appears from the proof, that, in the year 1842, Guild purchased from one David Manning, a number of cedar logs, for which he, in part, paid said Manning, and took his receipt, bearing date, July 23, 1842.

It further appears that some years afterwards, one Warner, a constable of Sumner county, had in his hands, certain executions against said Manning and his sureties, in favor of the clerk of the chancery court of said county; the proceeds of which, in whole or part, were to be paid over to the defendant, Baldridge. Manning, it seems, had promised the constable to let Guild have cedar logs to discharge the executions. The matter was permitted to slumber for some considerable length of time, without any step to enforce satisfaction of said executions. At length, Manning having died insolvent, the officer was urged by Baldridge to proceed to collect the money upon said executions; and the latter having understood that Manning, in his lifetime, had let Guild have some cedar timber, called on him, and informed him of the promise of Manning, that the money should be paid over to the officer in satisfaction of said execution. Guild replied to the officer that he thought he had paid the money to Manning at the time he got the logs; but if he had not, he would pay it to him. The matter rested in this way for some time. At the request of Baldridge that the matter should be closed, the officer again called on Guild, who answered as before, that he thought he had paid Manning when he got

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the logs, but had nothing to show payment, and if he had not paid it he would pay the officer. The officer informed Baldrige of what had passed between him and Guild. Finally, Baldrige insisted that the matter should be settled, and the officer procured Guild to go to the office of Baldrige. He, there, again repeated, in the presence of Baldrige, that, "he believed he had ~~payed~~ the debt, but ~~that~~ he had nothing to show payment; and as Manning was dead, he would have no bad feelings about it, and rather than have them, he would pay it again." He then gave his note to Baldrige for the amount, which was afterwards paid. Some time before the present suit was commenced, Guild found Manning's receipt, and presented it to Baldrige, and insisted that the latter should refund the money to him; Baldrige said he would consider it, but finally failed to do so.

The court, in substance, charged the jury, that if the plaintiff, believing that he had paid the debt to Manning, but choosing to pay it again, rather than be supposed to withhold it, paid the money to the defendant, as the creditor of Manning, without any understanding with the defendant that the money should be refunded in any event, then the plaintiff would not be entitled to recover; that it was important that the jury should ascertain whether there was any understanding between the plaintiff and defendant on the subject. If there was none, the defendant would be entitled to a verdict.

We will first consider, whether, in the foregoing instructions, the principles of law, applicable to the facts of the case, have been correctly laid down. We think not. That part of the charge which relates to an understanding between the parties, as to whether or not the money

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should be refunded in any event, and which was not called for by any thing in the proof, was irrelevant. The plaintiff either had, or had not, a right to recover, irrespective of any such understanding.

The principles which, in our opinion, ought to govern this case, are correctly stated in some of the recent English cases, to which we will refer.

i/ The case of *Kelley vs. Solare*, in the court of Exchequer, 9 Meeson & Welsby's Rep., 54, was an action of assumpsit to recover the sum of one hundred and ninety-seven pounds ten shillings, paid to the defendant under a mistake of fact, on an insurance upon the life of her deceased husband. The policy had, in fact, lapsed, shortly before the death of Mr. Solare, by the non-payment of the last quarterly premium on the policy; and two of the directors of the office had been informed of that fact by the clerk, one of whom, thereupon wrote on the policy, in pencil, the word, "lapsed." Some three months subsequent to this, the defendant, who was executrix, applied at the office for the payment of the sum secured on the policy in question, and two others; and the two directors who had been previously informed that the policy had lapsed, in conjunction with a third director, drew a check in her favor, for the amount, having entirely forgotten at the time, as they stated at the trial, that the policy had lapsed. Lord Abinger, chief Baron, before whom the case was tried, expressed the opinion, that if the directors had *had* knowledge, or the *means* of *knowledge*, of the policy having lapsed, the plaintiff could not recover; and that their afterwards forgetting it would make no difference. He accordingly directed a non-suit, with leave to the plaintiff to move to enter a verdict for him. A rule

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nisi was accordingly obtained; upon the argument of which, his Lordship admitted, that he had "laid down the rule too wildly to the jury, when he told them, that if the directors once knew the facts, they must be taken still to know them, and could not recover by saying that they had since forgotten them." And his Lordship added, "I think the knowledge of the facts which disentitles the party from recovery, must mean *a knowledge existing in the mind at the time of payment.*" The other judges concurred in opinion with Lord Abinger.

Parke, in delivering his judgment, said, "I think that where money is paid to another, under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid, if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it." He adds, "the position, that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Mr. Justice Bailey in the case of *Milnes vs. Duncan*, (6 B. & C., 671,) and, with all respect to that authority, I do not think it can be sustained in point of law." He furthermore says, "if indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a

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fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to enquire into the fact. In such a case the receiver was not entitled to it nor intended to have it."

This case was approved by the unanimous judgment of the court of common pleas, in *Bell vs. Gardiner*, 4 Manning & Grainger Rep., 10. The latter case was very fully considered upon the authorities, in argument. The action was assumpsit upon a promissory note made by the defendant, under a mistake as to the facts. The defendant had endorsed a bill of exchange, for the accommodation of the drawer, the bill was afterwards, without his knowledge, altered in a material point, so as to discharge him from liability. The bill being dishonored and payment having been demanded of him, he gave the note in satisfaction of that demand, in ignorance of the fact of the alteration of the bill.

The alteration was in the date of the bill and it appeared in proof at the trial, that the defendant had made a memorandum of the time when the bill would fall due; and that on two occasions after notice of its dishonor, he had seen the bill as altered. Lord Tindal, C. J., before whom the trial was had, left it to the jury to say whether, at the time of giving the note, the defendant had knowledge of the alteration of the bill; and that the question was not, whether he had the means of knowledge, of which there could be no doubt. The jury found for the defendant; and upon argument of the rule, *nisi*, for judgment in favor of the plaintiff, or for a new trial, all the judges concurred in discharging the rule. Tindal, C. J., said, "There may be cases where the existence of the means

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of knowledge might lead irresistibly to the inference that the party had actual knowledge; but there is no conclusive rule of law that, because the party has the means of knowledge, he has the knowledge itself.

Erskine, J., said, that it must now be taken, that it is no answer, in an action for money had and received, brought to recover back money paid by mistake, to say that the party had the means of knowing the facts, if he had not the knowledge in reality.

The case was argued upon the same principles applicable to the action to recover back money paid by mistake, though the court regarded it a stronger case, as the defendant stood upon the invalidity of the note sought to be enforced against him.

These cases are supported by previous decisions. In *Lucas vs. Worswick*, 1 Moo. & Rob., 293, it was held that money paid in the hurry of business, under a *forgetfulness* of the real state of the facts, might be recovered back. In *Chatfield vs. Paxten*, 2 East 471, note, Ashurst, J., says, that "where a payment has been made, not with full knowledge of the facts, but only under a *blind suspicion* of the case, and it is found to have been paid unjustly, the party paying may recover it back again."

Numerous American authorities, to the same effect, might be cited. In Story on contracts, § 422, it is laid down that "where money is paid by mistake, under an ignorance or forgetfulness of facts, or under a misapprehension of the state of the contract on which the party pays it, if he be not legally or morally obliged to pay it, it may be recovered back. Nor is it any defense to an action to recover such money, that the

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other party had the means of knowledge;" for which various cases are cited, to which we refer.

The foregoing authorities clearly establish, that to preclude a party from recovering back money paid by him, which he was neither legally nor morally bound to pay, upon the ground that the payment was made with knowledge of the facts, it must appear that actual knowledge of the facts existed in his mind at the time of such payment. The party to whom the payment was made, and who, in good conscience, has no right to retain it, cannot resist a recovery upon the ground of the plaintiff's negligence in availing himself of the means of knowledge within his reach.

The right of recovery proceeds upon the ground, that the plaintiff has paid money which he was under no obligation to pay and which the party to whom it was paid had no right either to receive or to retain, and which, had the true state of the facts been present in his mind, at the time, he would not have paid.

It is wholly immaterial, therefore, to what cause the mistake may be attributable. No sound discrimination can be made between the case of a plaintiff who is induced to part with his money, because he never, in fact, was possessed of knowledge of the facts that would have hindered him from doing so, and the case of him, who having once possessed such knowledge, is, at the time of parting with his money, laboring under an oblivion of memory in respect thereto. *Forgetfulness* of a material fact may, therefore, be said to be ignorance of such fact.

Neither can a recovery be resisted on the ground that the plaintiff, at the time of payment, may have enter-

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tained and expressed a vague *belief*, resting on no evidence and amounting to nothing like conviction or moral certainty, that he had previously paid the debt. The authorities cited require that he shall have had *knowledge* of the facts, and that term must be understood in its ordinary sense. To constitute a successful defense, in the absence of such knowledge, a case must be made within the rule laid down by Parke ~~Q. B.~~, before quoted, showing that the money was intentionally paid, without reference to the truth or falsehood of the facts; the plaintiff meaning to waive all inquiry into the facts, and that the person receiving shall have the money at all events, whether the fact be true or false. The case of such voluntary payment would stand rather upon the footing of a gift to the defendant, and of course, for that reason, could not be recovered back.

We do not, of course, mean to say that the plaintiff, in a case of payment without knowledge of all the material facts, may not be repelled upon other grounds, involving different principles; we think he may; as for instance, upon the ground of injury or injustice to the defendant in a particular case.

To illustrate the latter principle, take the case of a payment, without knowledge of the facts, made, not to the original creditor of the party paying, whose debt had been previously satisfied, but to a creditor of his who received the money in good faith, ignorant of the mistake, and in satisfaction of a just demand; and who, in consequence of such payment, may have waived or lost his remedy against his debtor. In such case, it is clear, upon well established principles, that the plaintiff would not be entitled to recover. The defendant, in the given case, would be equally innocent, as the plaintiff, of the mistake;

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and having lost his remedy upon the faith of such payment, it would not be against conscience for him to retain the money; and the loss must fall upon the plaintiff, by whose act, though innocently done, it was occasioned. But when no such injury would necessarily result, it is wholly immaterial as respects the plaintiff's right of recovery, whether the payment by mistake was to the person whose debt had been previously discharged, or to a third person claiming to be a creditor of his. The plaintiff's right is precisely the same as against either, in the absence of some such peculiar equity as is supposed to exist in the foregoing case.

From the principles laid down in this opinion, it results that the judgment must be reversed for want of proper instructions to the jury. But as the case must again be submitted to a jury, we forbear to make any more particular application of this principle to the facts of the case, leaving that to be done by the appropriate tribunal on another trial of the case.

Judgment reversed.

DECHERD *vs.* MORRISON.

EVIDENCE. *When illegal evidence is permitted to go to the jury, how it should be withdrawn.* If illegal evidence be permitted to go to the jury, the error can only be obviated by some act of the court, amounting to its withdrawal. The statement of counsel to the jury, that a verdict is not sought to be obtained upon the evidence, so admitted, does not cure the error.

This was an action of debt, commenced in the circuit court of Franklin county, by D. L. Morrison, against P. S. Decherd. The declaration contained three counts. The first, was for "so much money had and received," &c.; the second was for "work and labor," and the third alleges a special contract, made by the plaintiff, with the defendant and others, by which the plaintiff agreed to teach school for two sessions, and the defendant and others, were to pay a given price for each scholar sent to the school by each of them, and alleges further, that the defendant sent five scholars, &c. On the trial, at the March Term, 1851, MARCHBANKS, Judge, presiding, David Decherd was introduced as a witness, and proved that the defendant and others, agreed to pay the plaintiff five hundred dollars for teaching two sessions. To this evidence the defendant objected, but the court overruled the objection. In arguing the cause before the jury, the plaintiff's attorney told them that he did not ask or desire a recovery upon the contract proved by David Decherd.

There were verdict and judgment for the plaintiff, and the defendant appealed in error.

H. L. TURNER, for plaintiff in error.

COLYAR, for defendant in error.

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McKINNEY, J., delivered the opinion of the court.

The court erred in admitting evidence to go to the jury, of the agreement proved by the witness, David Decherd. This evidence was objected to when offered by the defendant's counsel, but the objection was overruled by the court.

It is conceded in argument, here, that the evidence was improperly received, because of its irrelevancy to the issue, or subject matter of the action, as set forth in the declaration; but it is argued, that the error was obviated by the statement of the plaintiff's counsel, in argument, to the jury, which the record shows to have been made; namely, that the plaintiff "did not ask, or desire a recovery upon the original contract, as proved by David Decherd."

We are unable to concur in opinion with the counsel for the defendant in error, upon this point. The admission of the evidence in question, was in violation of one of the most fundamental principles governing the introduction of evidence to the jury; that is, that the evidence must correspond with the allegations, and be confined to the point in issue.

This rule of evidence, in itself, as important as it is universal, excludes all evidence of collateral and irrelevant matter, which does not tend to establish, or afford any reasonable presumption or inference, as to the principal matter in issue between the parties.

The exclusion of such irrelevant evidence, is founded upon the just conclusion, that it necessarily tends to confuse and turn away the minds of the jury from the true matter of inquiry; to prejudice the opposite party by the introduction of matter upon the trial, of which

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he had no notice from the issue joined upon the record, and, uselessly to protract and increase the expense of judicial investigations. This admitted error of the court, could only have been obviated by some act amounting to a withdrawal of the evidence improperly received. The statement of counsel to the jury, that a recovery was not asked upon *that* evidence, did not at all cure the error; because, that still left the evidence before the jury; and it was before them as proper evidence in the judgment of the court; and, therefore, they were left at perfect liberty, in their own discretion, to make it, either the foundation of their verdict, or to give to it, such influence as they deemed proper, in connection with the other evidence in the cause.

What degree of influence the illegal evidence, may, in point of fact, have had upon the minds of the jury, or, whether or not, it had any influence upon the verdict, are inquiries alike impracticable and irrelevant.

The law takes for granted, that the admission of illegal evidence is productive of prejudice to the party against whom it is admitted, and will not stop to enquire, or to weigh the extent of the mischief; and therefore, altogether forbids its introduction.

For this reason, a new trial must be granted, and therefore, it becomes unnecessary to notice other grounds relied upon, of much less force.

Judgment reversed.

THE STATE *vs.* STEPHENS.

RECOGNISANCE. *Appearance of the party.* There is no obligation imposed upon a defendant by his recognisance, beyond the simple compliance with its terms. He cannot be required to appear at a time different from that stipulated, although the Legislature should change the time of holding the court.

Upon the facts stated in the opinion, the circuit court of Fentress county, at its October Term, 1852, GOODALL, Judge, presiding, gave judgment for the defendant, from which the State, by Attorney General, BRIEN, appealed in error.

ATTORNEY GENERAL, for the State.

SWOPE, for defendant.

MCKINNEY, J., delivered the opinion of the court.

The defendant, Stephens, on the 26th day of February, 1852, entered into a recognisance in the penalty, of one thousand dollars, to the sheriff of Fentress county, conditioned that he make his personal appearance before the judge of the circuit court of said county, *on the first Tuesday after the third Monday of June, 1852*, to answer an indictment for perjury, found against him in said court.

Shortly before this recognisance was entered into, namely, on the 21st day of February, 1852, an act of the general assembly was passed, changing the time of holding said court, from the third to the *second* Monday of June. And at the June Term of said court, held on the *second* Monday of the month, a judgment *nisi*, was entered up against the defendant, for the

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penalty of his recognisance, for failing to appear. *Scire facias* having issued, the defendant filed a special plea, averring that he appeared at the court house of Fentress county, ready to answer said charge, according to his recognisance, on the day therein stipulated. To this plea a replication was put in, which need not be noticed, as it neither met nor traversed the averment of the plea, and to which the defendant demurred. On argument of the demurrer the court gave judgment for the defendant, and the Attorney General prosecuted an appeal in error to this court.

The judgment on the demurrer was unquestionably correct. There was no obligation imposed upon the defendant by his recognisance, beyond a simple compliance with the terms. He cannot be held bound to appear at a time, or place, different from that stipulated. The effect of the recognisance cannot be varied, because of an error in stating the time of holding the court, nor even by an act of the Legislature altering the time. 4 Humph., 226.

Judgment affirmed.

BURKE *vs.* CLARKE.

WITNESS. *Competency. Vendor and Vendee.* The vendor of a slave, who sells with a covenant of warranty as to the soundness of the slave, as well as to the title, is an incompetent witness for his vendee in a suit, involving the question of the soundness or unsoundness of the slave.

This was an action of debt brought in the circuit court of Lincoln county, to recover the price paid for a slave. At the November Term, 1852, LUCKEY, Judge, presiding, there was a trial, and verdict and judgment were rendered for the plaintiff, and the defendant appealed in error.

BRIGHT, for plaintiff in error, cited 1 Greenl. Ev., § 397, and Notes; 1 Phil. Ev., 3d Am. Ed., 108-9.

KERCHEVAL, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of debt in the circuit court of Lincoln, brought by Clarke against Burke, to recover the price of a slave sold by the former to the latter, on the 2d of February, 1851, with a warranty of *soundness*.

The defence to the action was, that the slave was of unsound mind at the time of the sale. To repel this defense, the plaintiff, among other witnesses, called R. A. McDonald, who had sold and conveyed the slave to the plaintiff on the 7th of June, 1847, with a covenant of warranty as to the *soundness*, as well as to the title of said slave. And on this ground the defendant objected to the competency of said McDonald, but the court overruled the objection, and held the witness to be competent. And the question for our determination is, was this error?

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There is some difference of opinion upon this question, but the weight of authority, we think, is decidedly against the competency of the witness. Mr. Greenleaf lays it down, (vol. 1, § 397,) that the warrantor is incompetent as a witness for his vendee; and that it makes no difference in what manner the liability arises, nor whether the property is real or personal estate. If the title is in controversy, the person who is bound to make it good to one of the litigating parties, against the claim of the other, is identified in interest with that party, and therefore cannot testify in his favor. And if the quality or soundness is the subject of dispute, and the vendee with warranty has re-sold the property, with similar warranty, the principle is still the same. And the principle seems to be alike applicable to an *implied*, as to an express warranty.

The cases from the English books upon this subject are contradictory; and so, to some extent, are the American cases. In *Baldwin vs. Dixon*, 2 Moo. & Mal., 59, Lord Tenterden admitted the vendor of a horse, with warranty, as a witness for his vendee. In *Briggs vs. Crick*, 5 Esp., 99, Lord Alvanly, in a similar case, admitted the vendor in an action against his vendee, to prove the soundness of the horse at the time of the sale by the former to the latter. And this upon the ground, as it is said, that there was no direct interest, as the horse might have been sound when sold by the witness, and unsound when sold by his vendee. But, as has been justly observed of this decision, unless the evidence of the soundness of the horse at the time of the first sale, tended to prove his soundness at the time of the latter sale, it was wholly irrelevant; and if such were its tendency, then the witness had an interest to establish the fact of

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soundness in order to avoid his liability over on the warranty to his vendee. But in a more recent case, (1 M. & Rob., 302,) it was held, upon an examination of the authorities, that the vendor was incompetent on the ground that the effect of the judgment in favor of the defendant would be to relieve the witness from an action on his warranty at the suit of the vendee.

Mr. Starkie states the doctrine substantially as laid down by Greenleaf. He says (vol. 1, 105, 106, 6 Am. Ed.) that the possibility of an action being brought against the witness, in case his testimony shall not prevail, and the tendency of his testimony to render his liability less probable, will not exclude him. But that where actual gain or loss would result simply and immediately from the verdict and judgment; or where the witness is so situated that a legal right or liability, or discharge from liability, would immediately result from the verdict and judgment; or where such legal right or liability depends not simply on the verdict and judgment, but also on some material fact disputed in the cause, in respect of which the witness would be liable, in each of these three predicaments, the witness is incompetent. And he lays it down (vol. 2, 894) that a witness who is answerable to a vendee, in case the title turn out to be defective, is not competent to support the title in an action against his vendee founded on the alleged defect of title. But it is otherwise where the sale is without warranty. In Phillips on Evidence, (2 vol., 91, second Ed.,) the same principle is stated.

The rule which excludes the vendor, with warranty, as a witness for his vendee, is, we think, no less sustained by principle than by authority. And this rule can work no practical inconvenience, as the objection to

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the competency can readily be obviated by a release of the vendor's liability upon the covenant of warranty.

The judgment is erroneous, and will be reversed.

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BARNES vs. THOMPSON.

SHERIFF. *Diligence in the execution of process.* A sheriff is required to use ordinary diligence only in the execution of process which may come into his hands; and hence, if the debtor in an execution have property, and the sheriff, exercising ordinary diligence, (and this is a question of fact for the jury,) has no notice of it, he is not liable upon a return of *nulla bona*.

MECHANICS' LIEN. *Contract.* The lien given to mechanics should not be defeated by a too rigid construction of the statutes; so that, although the lien is given upon the condition that "a special contract, with the owner of the lot of ground," is made by the mechanic or undertaker, nothing more is required than an employment and undertaking to do the work.

SAME. *Manner of enforcing it. Attachment.* The benefit of the lien given to mechanics, can only be preserved by attachment.

This was an action in the circuit court of Davidson county, upon the facts stated in the opinion. At the January Term, 1852, TURNER, Judge, presiding, there was judgment for the plaintiff, and the defendant appealed in error.

REID and R. G. SMILEY, for plaintiff in error, cited 8 Smedes & Mar., 754; 3 Serg. & Rawle, 541; 13 Penn. State Rep., (1 Harris,) 495; 2 Humph. 388.

T. G. JONES, for defendant in error, cited *Foust vs. Wilson*, 3 Humph., 31, 33.

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CARUTHERS, J., delivered the opinion of the court.

This is an action on the case by the defendant against the plaintiff in error, as sheriff of Davidson county, for a false return of an execution in his favor, against one A. G. Goodlett, issued from the September Term of the circuit court, 1848. The return was no property found. The truth of this return is controverted, and the liability of the sheriff insisted upon, because the judgment of Thompson was upon an account for painting done on the house of Goodlett, in the city of Nashville, which, under the statutes in favor of mechanics, was a lien upon the said house and lot; and as such, ought to have been enforced by a levy and sale, although the said lot had been sold and conveyed by Goodlett before the judgment.

Thompson sued in assumpsit for work and labor, and commenced his action by summons against Goodlett, within the year the work was done. He recovered a judgment for eighty dollars against Barnes in the circuit court. A motion for a new trial was overruled, and appeal in the nature of a writ of error to this court.

1. It is contended here that the sheriff was not liable as for a false return, although Goodlett may have had property in this county, or if the said house and lot was subject to this claim, under the mechanic's lien, provided he used ordinary diligence and had no knowledge or notice of it; such we consider to be the law, as settled in the case of *Trigg vs. McDonald*, 2 Humph. 386; and *Watson on Office and duty of Sheriff*, 119, (5 Law Lib., 143.) But this is a question of fact for the jury, which was in this case found by them against the sheriff, under a correct charge of the law as above laid down, and we

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cannot say there was no evidence to sustain them on that point.

2. It is insisted that the statutory lien given to mechanics, is upon the condition that a "special contract with the owner of the lot of ground" is made by the mechanic or undertaker; for this is the wording of the statute. But we think it would be sticking in the bark to require any thing more than an employment and undertaking to do the work. To this effect in substance was the charge of the circuit judge, and we consider it a correct exposition of the act. The object of the legislature was to secure to an industrious, meritorious class of the community, the benefit of their labor; and the act should be so construed as to carry out this laudable purpose. The manifest intention and policy of the legislature should not be defeated by a too rigid construction of their language. So, if Mr. Thompson pursued the remedy given him by the statute to fix his lien, and the sheriff was aware of the liability of the lot, (which the jury have found to be so,) we would say that the verdict and judgment against him cannot be disturbed.

3. It is objected that the lien could only be maintained and enforced by an attachment in law or equity, and that a suit commenced and prosecuted in any other mode or form, is a waiver of the lien. If this be so, the lot was not liable to the execution of Thompson, and the sheriff is not culpable. The circuit judge charged the law differently, and in this we think there is error.

In the Act of 1825, ch. 37, by which the benefit of this lien was first given to mechanics, nor in the Acts of 1829, ch. 26 and 1835, ch. 40, by which its provisions are amended and enlarged, is there any thing said about the mode of enforcing it. No mention is made of a suit, but

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in reference to the continuation of the lien. It shall continue for one year, and "until the decision of any suit that such mechanic may bring within that time."

Under these acts of assembly, doubts were entertained at the bar and on the bench, both as to the proper form and mode of proceeding to be resorted to for the enforcement of the lien. These doubts were thrown out in the case of *Foust vs. Wilson*, 3 Humph., 33, decided in 1842. The legislature in 1846, ch. 118, Nich. Sup., 222, passed an act entitled "An Act to perfect the lien of mechanics, and to extend the same to journeymen and others." This embraces and enlarges the provisions of all the other acts. The 3d section is in these words: "That the lien herein given may be enforced by attachment, either at law or in equity." We think this section was intended to clear up all doubts of the remedy. To secure the benefit of his advantage over all others who might have claims equally just against the same debtor, this particular creditor is required at the commencement of his action, to shew that he holds the property on which he has done the work, liable for his debt by attaching it. This is made necessary for the safety of others who may purchase or extend credit, and the officer in whose hands his final process may come for execution. The facts of this case illustrate the propriety of the construction we have given the statute. Here there was nothing in the execution in the hands of the sheriff, or the original process, or the proceedings in the case, to shew that the property in question was liable by virtue of a lien in favor of the plaintiff, as a mechanic. The officer was advised the lien was lost, and there was nothing on the record to guide him to a different conclusion. It is reasonable to conclude that it was the intention of the

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legislature to avoid these and other difficulties, by requiring the favored creditor to commence his suit, either in law or equity, by attachment, if he desired to rely upon his lien. It is as easy, direct and simple, as a proceeding in the ordinary way. It can work no injury to him, and may avoid injustice and hardship to others. We do not say that the mechanic creditor may not proceed by summons, as in this case, but what we decide is, that the benefit of his lien can only be preserved by attachment. We might also remark in support of this view, that when the legislature say "that the lien hereby given may be enforced by attachment," that as the word "may" is, to say the least of it, generally construed in statutes to have the same meaning as the word "shall;" Salk., 609; Skinn., 370; Carth., 293; 3 Ark., 166, 282. It is in this act imperative, and the suit must be by attachment.

We are therefore of the opinion that the lot of Goodlett was not liable to be sold under the execution in favor of Thompson, by force of the lien of the latter as a mechanic, and consequently that the sheriff, Barnes, would not be liable in the action for a false return, because he did not levy upon and sell it.

The judgment of the court below is reversed, and the case remanded for a new trial, on which the law will be charged as above settled.

MORTON vs. MORTON et als.

CONSTRUCTION OF WRITINGS. *Will.* A testator devised a tract of land thus: that it "be equally divided between my children, William E. Morton, John S., Sarah N., Geo. W.; Thomas R., or to as many as are alive when divided." From this devise it manifestly appears, that none other than the children named should participate in the devise; and in the event of the death of either before the devise should take effect, the issue of the one so dying, should not represent the parent in the devise.

The complainant, upon the facts stated in the opinion, filed this bill in the chancery court at Franklin. At the December Term, 1852, chancellor BRIEN, presiding, there was a decree excluding William S. Morton, the son of William E. Morton, from any participation in the division of the Gilchrist farm; and from this decree William S. Morton appealed.

MARSHALL, for the complainant and the respondents, except William S. Morton.

WM. F. COOPER, for respondent, William S. Morton.

CARUTHERS, J., delivered the opinion of the court.

The tenth clause in the will of Lemuel Morton is in these words: "My wish and desire is, that the Gilchrist tract of land, lying in Bedford county, be equally divided between my children, W. E. Morton, John S., Sarah N., Geo. W., and Thomas R., or to as many as are alive when divided."

The nineteenth clause reads thus: "My wish and desire is, that those of my children, that have not arrived at the age of nineteen years, when they do arrive at that age, receive the property that is left to

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them, but not be suffered to dispose of it, without the consent of my executors, or their guardians, until they arrive at the age of twenty-one years."

William E. Morton was more than twenty-one at the date of the will. He died before the testator, his father, leaving an only child, the defendant, William S. Morton, who is still under the age of nineteen.

The complainant, John S. Morton, is now over the age of nineteen, and files this bill for the partition of the Gilchrist tract of land.

The only question in the case is, whether the son of William E., the said William S., is entitled to the share of his father.

The chancellor decreed against him, and he appealed.

It is argued that the case is embraced, and his right saved by the third section of the act of 1842, ch. 169. Before that act, the death of a devisee or legatee, before the testator, would cause the devise or legacy to lapse, and the benefit of it, could not be claimed by the children or representatives. But by that act, the lapse is prevented where issue are left, and the same "shall take effect, as if the death had not occurred, till after the death of the testator; that is, it shall go to the issue, *unless a contrary intention shall appear by the will.*" Nich. Sup., 148.

Now, when this devise is tested by the act relied upon, what is the result? The devise is to his son, William E., and the law is, that in the event of his death, leaving issue, before the testator, the devise shall not lapse, as it would have, without the change of the law, unless it appeared by the will, that it was not the intention that the children should take in the place of the father, or, as he would do, if living.

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It is difficult to see how plainer words could have been used to evince an intention, that none other than the children named should participate in this devise. It is to go to, and be equally divided between, the five children named, "or to as many as are alive when divided." He seemed to anticipate the probability of the death of some of them and provided, in that event, that this particular land should be divided only between such of his said children as might be living at the time of division, which time was fixed in a subsequent clause. He thus expressly guarded, as it would seem, against the right of the issue to represent the parent in this devise.

So, we consider it very clear, that even if this were a case falling under the act of 1842, the son of William E., is excluded by its provisions; as the "contrary intention" referred to, is manifest in this will.

Many cases are referred to, in argument, to show that the courts will often change the word or, to and; imply words; disregard those used; reform sentences, &c., in the construction of wills. But, it is sufficient to remark, in relation to all these cases and rules, without examining them in detail, that they only apply where there is uncertainty in the will, and are resorted to for the purpose of ascertaining and carrying out the intention.

The decree of the chancellor is, in all things, affirmed, and the cause is remanded for further proceedings.

McKINNEY vs. CLARKE *et als.*

FRAUD. Marriage. Chancery. It matters not how fraudulent may be the motives which may prompt parties to enter into a contract of marriage, or what may be the consequences resulting from such marriage, as affecting the rights of third persons; if the marriage be in compliance with the forms of law, and with the full consent of the parties, they being capable of contracting, the chancery court has no power, upon the application of a third person, either to dissolve the bonds of matrimony, or to relieve against any of the consequences which result from the marriage.

The opinion states the purposes for which the bill in this case was filed. The decree from which the respondents appealed was rendered at the February Term, 1852, of the chancery court at Fayetteville.

KERCHEVAL, for complainants.

F. B. Fogg and Ross, for respondents.

McKINNEY, J., delivered the opinion of the court.

This bill was brought to annul a marriage entered into, under all the forms of law, between the defendants, John and Mary Clarke, on the ground that said marriage was contracted, not in good faith, but for the sole purpose of defeating the rights of the complainant, who was a judgment creditor of said Mary prior to the marriage.

It appears that the defendant Mary, for several years prior to her marriage with defendant, John Clarke, was the widow of Cornelius Sullivan, who died in 1846. By his last will and testament, said Cornelius devised and bequeathed to said Mary, a plantation and six slaves, "*during her natural life or widowhood,*" with remainder to his children.

Some time prior to the marriage between said Mary and defendant Clarke, the complainant recovered several

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judgments against said Mary in her own right, and caused executions to be issued thereon, which were levied upon said tract of land and slaves, held by her under the foregoing clause of her former husband's will.

After the levy, and shortly before the day appointed for the sale of said property, said Mary intermarried with the defendant Clarke. The marriage, in point of form, was solemnized in accordance with the prescribed ceremonies of the law, and with the mutual consent of the parties, both of whom were *sui juris*, and possessed of competent capacity to contract. But it is placed beyond all doubt, from the proof in the cause, that the main, if not the sole, inducement to the marriage, on the part of said Mary, was to put an end thereby to the estate vested in her during widowhood, under the before mentioned will, so as to defeat the complainant's levy and the recovery of his debt. The motives and conduct of said Mary, in forming this matrimonial alliance, are of a character, as exhibited in this record, to shock the moral sense of the community, and to outrage all the decencies of social life. It is probable from the proof, that she has not, in fact, and perhaps never intended to co-habit with said Clarke, who is proved to be a drunken sot, degraded in reputation and loathsome in appearance and habits. These, and other facts established in the proof, leave no doubt upon the mind that the object of the marriage was to defeat the rights of the complainant. Still, however, the parties themselves acquiesce in the marriage; profess to regard it as valid; recognize each other as husband and wife; and insist that there attaches to it all the legal rights, obligations and consequences resulting from that relation.

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The bill seeks to annul the marriage, and to subject the property to the satisfaction of the complainant's judgments, as if no such pretended marriage had taken place.

The chancellor decreed the marriage void, so far as respects the rights of the complainant, and ordered the interest of defendant Mary, in the property (which the decree assumes to be a *life* estate) to be sold for the satisfaction of complainant's debt. From this decree the defendant's (including the persons who claim the estate in remainder under the will) have presented an appeal in error to this court.

This is a novel case. The books to which we have had access have been searched in vain for a parallel. But, upon principle, it presents no difficulty.

The jurisdiction of a court of equity to annul a marriage, on the ground of *fraud*, at the instance of *one of the parties* to the marriage contract, is a question which, as it does not arise upon this record, we will not at present discuss.

The question before us is, whether a court of equity has any jurisdiction to entertain a bill, brought by a *stranger* to the contract, to annul a marriage entered into by the mutual assent of parties capable of contracting, and valid according to the forms of municipal law, merely upon the ground, that the motive of the parties in contracting such marriage was to defeat, and that in its legal consequences it may defeat, some right or remedy of such third person, which otherwise might have been asserted? This question can admit of no debate.

Marriage is emphatically a personal contract, and its basis is the mutual consent of the parties. But, in the language of Mr. Story, (Conf. of Laws, p. 100, note 3,)

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"it is something more than a mere contract. It is rather to be deemed an institution of society, founded upon the consent and contract of the parties; and in this view has some peculiarities in its nature, character, operation, and extent of obligation, different from what belong to ordinary contracts."

Unlike other contracts, it is indissoluble between the parties. When consummated according to law, it is of perpetual obligation, and cannot be renounced at the will of either or of both parties. It continues to exist until a dissolution is produced either by the death of one of the parties, or by a divorce. 2 Bl. Com., 440; 2 Kent Com., 94. It differs in another respect from all other contracts; the rights and duties growing out of it, are not left to the option or agreement of the parties; but, to some extent, are matters of municipal regulation, over which the will of the parties can have no control. Sto. Confl., p. 101. It continues to subsist in full force, even although one of the parties should be rendered incapable forever of performing his or her part of the mutual contract, as in case of incurable insanity, or the like. *Id.*

Such is the nature of the contract of marriage; an institution which lies at the very foundation of all social order and morality, and constitutes the chief corner stone of the whole structure of civilized society.

The contract of marriage, then, having its foundation in nature, and resting, in its origin, upon the mere consent and mutual agreement of the parties, when complete according to civil regulations, becomes indissoluble, except by death or divorce; and so long as the relation is acquiesced in by the immediate parties, no tribunal on earth is clothed with the jurisdiction to interpose to annul it. No more startling or absurd

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proposition can be conceived, than that a marriage, legal in form, acquiesced in and held obligatory by the parties, and recognized as valid by law, might be annulled at the instance of a third person, for any cause whatever. So far as regards the legal consequences resulting from marriage, either as respects the parties or third persons, it can be of no consequence what were the motives or inducements to the contract. The only inquiry, at least as to third persons is, does a marriage in fact exist according to the prescribed forms of law? If so, the motive which prompted to the marriage, or the consequences flowing from it, are wholly irrelevant, so far as relates to the validity or effect of such marriage.

If a marriage may be annulled for *fraud*, it must be such a fraud as operates upon one or other of the immediate *parties* to the contract, and has the legal effect of vitiating the contract between the parties, *ab initio*. But, as respects *strangers*, fraud cannot be predicated of a contract which the immediate parties thereto may lawfully enter into, which no principle of municipal law forbids, or can restrain the consummation of.

From these obvious principles it results, that to entertain the present bill would be an usurpation of jurisdiction conferred upon no human tribunal; and which, consistently with the fundamental principles of society, never can be.

The interest of the defendant Mary, was an estate upon condition; and her subsequent marriage with the other defendant, was an absolute forfeiture of that estate as to herself, her creditors, and all other persons. This forfeiture she might incur at pleasure; it depended solely upon her own volition and act; and no power, known to our law, could have restrained her from

[*Finch, Chairman, &c., for the use of Thomas vs. Gore.*]

doing so. It would be grossly paradoxical, then, to hold that a forfeiture lawfully incurred, could be relieved against; or, that a court of equity, though powerless to prevent the forfeiture by restraining the marriage, had nevertheless the jurisdiction to relieve against the consequences of such forfeiture.

But it is needless to pursue this discussion further, as the want of all such jurisdiction admits of no question.

The decree will be reversed, and the bill be dismissed.

FINCH, Chairman, &c., for the use of Thomas vs. GORE.

APPRENTICE. *County court. Act of 1762, ch. 5, § 19.* The statute of 1762 does not otherwise limit the extent of the provisions in favor of an indented apprentice, than by fixing the minimum that shall be required of the master; and it is therefore held, that it is the duty of the county court, in acting for infants and orphans, under this act, to secure for apprentices, so far as they can, the most liberal provision and compensation from the master.

SAME. *Same. Bond.* Though a bond taken under the act of 1762, ch. 5, § 19, is made payable to a person who is at the time chairman of the county court, but who is not so described in the statement of the parties to the bond, or by his signature thereto; yet, if his official character be stated in the bond, it is a good statutory bond. Nor is it necessary to constitute it a good statutory bond under this act, that it should be made payable to the chairman, "or his successors."

December 3, 1838, the following bond was executed by the parties thereto: "I, Wallis Estill, chairman of the county court of Franklin county, by the direction of court, in their behalf, do hereby bind John F. Thomas, an orphan of the age of eleven years, to Joshua Gore,

[Finch, Chairman, &c., for the use of Thomas vs. Gore.]

with him to live and work as an apprentice, until he attains the age of twenty-one years' old; during which time, the said John F. Thomas shall obey the lawful commands, and faithfully serve the said Joshua Gore, and be, in all respects, subject to his authority and control, according to law, and his duty as an apprentice; and the said Joshua Gore, on his part, covenants that he will give him, the said John F., one year's schooling, and have him taught to cypher to and through the double-rule of three, or cause the same to be done; and he will also constantly find for the said John F., sufficient diet, lodging, washing, and apparel, and other necessaries, suited to an apprentice, both in sickness and in health; and also, take care of his morals, and treat him with humanity; and at the end of his time, will give him one suit of clothes, to be good; and also, a horse, saddle, and bridle, worth one hundred dollars.

"In witness whereof, the said Joshua Gore, and Wallis Estill, chairman, have hereto set their hands, and seals, the 3rd December, 1838.

"JOSHUA ^{his}  GORE, [seal.]
_{mark.}

"W. ESTILL, [seal.]"

In March, 1852, an action of covenant was instituted upon this bond, in the circuit court of Franklin county, in the name of Thomas Finch, chairman of the county court of that county, for the use of John F. Thomas. To the declaration the defendant demurred, and the court sustained the demurrer, whereupon the plaintiff appealed in error.

COLYAR, for plaintiff in error, cited 10 Yerg., 465; 1 Humph., 94; 3 *Ibid.*, 500; 4 *Ibid.*, 146, 334.

[Finch, Chairman, &c., for the use of *Thomas vs. Gore*.]

CARTER, for defendant in error, reviewed the cases referred to by Colyar, and cited *Davis vs. Bratton*, 10 Humph., 179.

CARUTHERS, J., delivered the opinion of the court.

This is an action of covenant, founded on an apprentice bond, dated 3rd December, 1838, between Wallis Estill, then chairman of the county court of Franklin, and the defendant, on the binding of said J. F. Thomas, then eleven years old. The term of service has elapsed, and this suit is brought by the plaintiff, as successor of said Estill, to enforce the covenant in favor of the apprentice.

The bond is set out in the declaration, and by it, we see that the covenants of defendant are larger, more in favor of the apprentice, than the statute on this subject prescribed. To the declaration there is a demurrer, which was sustained by the court, and the suit dismissed; from which judgment there is an appeal to this court.

The following objections to the bond are presented in argument, as the grounds upon which the demurrer, was sustained; and we are called upon to determine whether there is error in the judgment below. The objections are all grounded upon the position, that as the suit is brought by the present chairman, as successor of Estill, to whom it was taken in his official capacity, it cannot be sustained, unless it is a statutory bond; that is, taken in strict conformity, to the provisions of the statute on that subject. This is certainly a correct legal proposition. For, if not taken in compliance with the statute, it might be good as a voluntary, or common law bond,

[Finch, chairman, &c., for the use of *Thomas vs. Gore*.]

but would have to be sued upon, as such, by Estill, or his personal representatives, and not by his successor in office, as the law was settled in the case of *Hibbitts vs. Canady*, 10 Yer., 465, and other cases.

The first objection here taken, is, that this bond requires more to be done by the master, than the act of 1762, ch. 5, § 19, Car. & Nich., 98, requires. This act only provides expressly, that the master shall provide "diet, clothes, lodging and accomodations, fit and necessary, and teach, or cause to be taught, him or her, to read and write;" and, "at the expiration of the apprenticeship, shall pay the apprentice the like allowance, as is, by law, appointed for servants, by indenture, or custom." Now, what is appointed for servants by indenture or custom? We are not informed by the act. When we turn to the act of 1741, ch. 24, we find, that it is founded on a relation and state of society, which is now scarcely, if at all, known in our community, and its provisions generally obsolete.

But we do not understand the act of 1762, as limiting the county court as to the extent of their provisions in the indenture, they are required to take in the 20th section, to the items prescribed in the previous section. *Davis vs. Bratton*, 10 Humph., 180; 2 Dev. & Battle, 476.

The minimum, but not the maximum, is set forth. It would be absurd to give it any other construction, in the absence of an express prohibition upon the county court. If the apprentice is only ten years old, shall he serve his master eleven years, and receive no more than if he was nineteen at the time of binding, when he will have but two years to serve? Can the Legislature be presumed to have thought it necessary to have prohibited the county court from making the best

[Finch, chairman, &c., for the use of Thomas vs. Gore.]

terms it could, for a poor, unprotected orphan child? Or, did they consider it important to save and protect the master from voluntarily agreeing to give too much? No such absurdity can be supposed. We hold it therefore, to be clear, that the Legislature intended, and that it is the duty of the county court, in acting for infants and orphans, under this act, to make the best bargain they can for the benefit of the apprentice. The master is competent to contract, and will take care of himself. There is, then, nothing in the objection.

Secondly: It is objected, that this bond is taken by Wallis Estill, and so signed, and not to him, as chairman, and his successors, as the 20th section of the act requires. Nor does it appear that the same was acknowledged in open court, as the law requires. His official character is twice stated in the bond, though not affixed to his signature. This is sufficient. It is not necessary when the character in which a party contracts, is set forth in the body of an instrument, that it should again appear with his signature at the bottom.

Nor do we deem it necessary to the validity and statutory character of the bond, that it should be taken to the chairman and his successors. To be sure, the statute so provides. But this opinion, does not invalidate it. It is a bond taken to the office, and not the officer, in legal contemplation. Every incumbent of the office would have a right to enforce it, because it is taken to the officer, and not to the person. It is true, if it were taken to a different officer or functionary, than the one prescribed by the statute, it would not be a statutory, but yet, a good voluntary common law bond. The only difference would be in the name in which the suit should be brought; not in the validity of the

[Finch, chairman, &c., for the use of Thomas vs. Gora.]

bond, or the right to recover upon it. A suit can only be in the name of the successor when the bond is taken to the officer designated in the act of assembly, under which it is taken. This is the doctrine laid down in *Hibbitts vs. Canady*, 10 Yerg., 467. There the bond of an administrator was taken to "James Hibbitts, chairman, &c.," when the law, at that time, required it to be the Governor. If then, in this case, the bond had been to any other functionary than the chairman of the county court, it would have destroyed its statutory character, and no suit, for that reason, could have been maintained in the name of the plaintiff, who sues as the successor of the obligee. The suit, in that case, would have to be in the name of Estill; or, if dead, his personal representative, as upon the common law bond. *Jones vs. Wiley*, 4 Humph., 146.

But, though this is the proper officer, yet, the word "successors," is omitted. It is necessarily understood, and the law will supply it; or, whether supplied or not, makes no difference, as each succeeding chairman, by force and virtue of his appointment, is vested by law, with all the rights, duties and powers of his predecessor; consequently, all bonds, payable to his predecessor, as such officer, for the use of others, or the public benefit, are to be regarded as payable to him; from which principle a right to sue necessarily results.

The only remaining objection is, that it does not appear that said bond was recorded, &c., as required by the statute. We cannot look into that question, upon demurrer; such defect, if it be one, cannot be taken advantage of in this mode.

We take it, upon the question before us, that every thing required by the statute, has been done by the court

[The State vs. J. S. & W. J. Scott.]

to which the business was intrusted, unless the contrary appears on the face of that part of their proceeding, judicially brought to our notice.

The defendant, after having received the services of the orphan boy, for eleven years, and is now endeavoring to deprive him of the small compensation secured in the covenant, upon technicalities, does not, to say the least of it, deserve any thing more than strict law. We certainly do not feel called upon to strain the law for his benefit. We, therefore, reverse the judgment of the court below, sustaining the demurrer; overrule the same, and remand the cause for further proceedings, on the covenant declared upon, as a statutory bond.

THE STATE vs. J. S. & W. J. SCOTT.

TURNPIKE ROADS. *Scire facias. Practice.* The proper practice under the Act of 1835, ch. 54, § 4, to vacate a charter granted for the construction of a turnpike road is, that the attorney general shall file in the circuit court, officially, such information as he may have respecting the abuse of the franchises or privileges granted to the proprietors of turnpike roads; and the court may thereupon, if the information be deemed sufficient to authorize such a proceeding, direct a *scire facias* (which shall issue in the name of the State, and be signed, as other process, by the clerk) to issue, calling upon the owners of the road to appear before the court, that they may show cause why the charter granted them should not be vacated.

This was a proceeding in the manner stated in the opinion, in the circuit court of Fentress county. At the February Term, 1852, QUARLES, Judge, presiding. there was judgment for the defendants, and attorney general BRIEN, in behalf of the State, appealed in error.

[The State vs. J. S. & W. J. Scott.]

ATTORNEY GENERAL, for the State.

SWOPE, for defendants, cited Arch. 73.

CARUTHERS, J., delivered the opinion of the court.

By the Act of 1848, ch. 219, the legislature incorporated the defendants and "their associates and successors," under the name of the "Montgomery Turnpike Company," with power "to contract and keep in repair a turnpike road, commencing on the south bank of Wolf river, in Fentress county," &c.

On the 22d October, 1851, M. M. Brien, Esq., attorney general of the 4th circuit, filed with the clerk of Fentress circuit court, a paper which he denominated a writ of *scire facias*, signed by himself, directed to the Sheriff of Fentress county, commanding him to summon the defendants to appear at the next February Term of said court, and shew why their charter should not be vacated and declared null and void, because their said road was, and had remained for more than six months out of repair.

The clerk endorsed the writ "filed 22d October, 1851, by the attorney general." It was served upon the defendants by the sheriff, and they appeared at February Term, 1852, and moved to quash the said proceeding, which was done by the court, and the State appealed.

This proceeding is founded on the Act of 1835, ch. 54, § 4. Car. & Nich., 698. This act makes general regulations in relation to all turnpike roads, provides a committee of three "commissioners or superintendents" for each county, to examine the roads, open gates when out of repair, &c. And the 4th section says: "If any grantee

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or owner of any turnpike road or toll gate shall fail, for the space of six months, at any one time, to put or keep the same in good repair, it shall be the duty of the attorney general (upon satisfactory information being had) to issue a scire facias in the name of the State, stating the charge and complaint, and requiring the party to appear and shew cause why their charter should not be vacated, forfeited and annulled."

Now the question here is, whether a scire facias, signed by the attorney general and not by the clerk, upon some record or official complaint lodged with him, can be sustained. We think the act requiring by the letter that officer to issue this writ, did not intend that it should proceed from him, nor by his authority alone, and be sustained by his signature, as is attempted in this case.

The intention of the legislature was, that he should collect the facts, and file his official information before the court as a foundation for the writ, and then that the same, like any other process, should run in the name of the State, with the signature of the clerk. At all events, the information should be filed with the clerk of the court, as a foundation for the writ to be issued by the latter. And even the validity of this course would be doubtful. It surely could not have been intended, that a proceeding of such serious import as this, demanding the forfeiture of a solemn charter, and the vacation of so important a grant as the right to a turnpike road or bridge, should be instituted without any foundation of record at the discretion of the prosecuting officer. By the Constitution of Tennessee, Art. VI., § 12, "all writs and other process shall run in the name of the State of Tennessee, and bear test, and be *signed* by the respective clerks."

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A *scire facias* is a writ. It is sometimes the commencement of a new action, as when it is issued to repeal a patent, vacate a charter and the like, (there being no action on which it can be founded;) it is in other cases the continuation of a suit, as when brought to revive a judgment after a year and a day from its rendition, or upon the marriage or death of parties. 4 Bouv. Inst., 85.

If it be a writ, it must "bear test and be signed by the clerk." A proceeding under this statute is somewhat in the nature of criminal information in England. It is, as that was, a substitute for an indictment or presentment in certain designated cases. That was a proceeding by which offenders could be called upon to answer charges and be subject to penalties otherwise than by indictment. But by our constitution no one can be called to answer for any crime, but by presentment or indictment, and the case is only referred to for its analogy to this, as an illustration of the ground we take here. These informations were made in writing by the King's attorney general *ex officio*, or by the master of the crown office; Arch. Cr. Pl., 69 and 70. These informations are required to contain the material facts constituting the offense charged, so that the court might see that they were sufficient, before a rule to proceed could be granted; *Ibid*, 73, 74. So, before further proceedings, the court were to judge of the charge made, and pass upon its sufficiency, to call upon the accused to answer. This was a protection to the citizen against frivolous or insufficient accusations.

We do not believe that a relator or prosecutor is necessary here to be responsible for cost, as it has been contended for defendants. But the attorney general, whose duty it is made by the statute in question, must file *ex officio* his complaints or information, setting forth the

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facts charged, in lieu of an indictment or presentment, that the court may see whether they are sufficient to call upon the accused to answer. That is sufficiently done in this case, but not in the right form; nor was it submitted to the court as a foundation for an order for the writ to issue. If the court so regards them, the same will be filed as a foundation of the proceedings, and a writ of scire facias will be ordered to issue by the clerk. The attorney general may make the information or charge upon any ground that may be satisfactory to him, without more; or he may accompany his charge with affidavits. Either will be sufficient to call upon the accused to answer if, in the opinion of the court, enough be set forth in the written accusation. It will be taken as prima facie true, for the purpose of calling upon the defendant to answer. The legislature surely could not have contemplated a proceeding so informal as the one now under consideration, or less so than the mode we have herein prescribed.

We think then, that the court below committed no error in quashing the so called scire facias, and we therefore affirm the judgment.

ALLEN vs. PRIMM.

APPEAL. Certiorari and supersedeas. The petitioner for writs of certiorari and supersedeas to remove a cause from before a justice of the peace into the circuit court, alleged the following as reasons for not appealing: that the services of Hill, a justice of the peace, had been engaged to manage and conduct the suit as the friend and agent of petitioner (he being old, blind, and ignorant) who advised him, when he attended at the proper time to take the appeal, not to do so, as the case would go the same way in the circuit court. The advice was taken but the petitioner afterwards ascertained that he had sat upon the case and united with the other justice, Nelson, in giving judgment against him. *Held* that this was a sufficient reason for not appealing, and the petition containing matters showing merit, it was proper to grant the writs of certiorari and supersedeas.

Primm presented his petition for writs of certiorari and supersedeas, (containing the reasons stated in the opinion why he had not appealed) to the circuit court for Williamson county, at its March Term, 1852, which being granted and the case removed into the circuit court, a trial was had, MANEY, Judge, presiding, when there was judgment for Primm and Allen in error.

R. C. FOSTER, for plaintiff in error, cited 4 Hayw., 100, 143; 2 Tenn., 179; 3 Humph., 137, 148.

MARSHALL, for defendant in error, cited 2 Tenn., 108; 3 Humph., 145; 5 *Ibid.*, 146.

CARUTHERS, J., delivered the opinion of the court.

It is insisted in this case, that the circuit court erred in granting the petition of plaintiff for writs of certiorari and supersedeas, by which the case was removed for a new trial, from a justice of the peace to the circuit court, because sufficient reason is not given for failing

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to appeal. The reasons given, are, that the services of Hill, a justice of the peace, had been engaged to manage and conduct the suit, as the friend and agent of petitioner, he being old, blind and ignorant, who advised him, when he attended at the proper time to take the appeal, not to take it, as the case would go the same way in the circuit court. His advise was taken, under the idea, that it was given in good faith and without any bias on his mind. The said Hill had told him at first, when the warrant was taken out, that he would not set upon the case but, would attend to it for him. But he afterwards ascertained that Hill had set upon the case, and united with Justice Nelson, in giving judgment against him. Upon the discovery of this fact he presented his petition to the circuit court of Williamson, to bring up the case for a new trial. That the merits were sufficient is not controverted, and the verdict of the jury, in favor of Primm, is conclusive.

We think the reasons given for not appealing are sufficient. The fact that a party litigant acts upon wrong advice given by a neighbor, friend, or even a lawyer, might not answer as an excuse, but, in this case, the wrong counsel was given by a member of the court, who might feel disposed to sustain his own judgment, but, in addition to that, he had deceived Primm, by pretending to be his friend in the case, and controlling him by his advice, when, in fact, he had, contrary to his assurance, sat as a judge upon his case, and decided it against him. The jurisdiction of magistrates has now become so much enlarged, embracing more than nine-tenths of all the litigation of the country, it is important to guard their purity with a more watchful care.

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It will not do to allow them to become counsellors and judges in the same case. This old man, who had been shamefully defrauded, had made up his mind fully to appeal, from what he regarded as a most unjust judgment, and was prevented from doing so, by one of the judges, who pretended to be his friend and impartial adviser; and such, he had a right to consider him, from what had previously occurred between them. But, it appears that as soon as he ascertained that Hill had sat upon his case, and consequently, that his advice might not be disinterested and impartial, he immediately renewed his original intention, to have a re-investigation of his case, and filed his petition.

There was no negligence here on the part of petitioner, but he was misled by the wrong counsel and breach of trust of one of his judges. Whether the magistrate so intended it or not, he caused a loss and injury to this unfortunate old man, which ought to have been redressed.

The judgment of the circuit court will be affirmed.

BLACKMORE vs. BARKER et als.

CHANCERY. *Judgment. Notice.* The purchaser of property, sold under a decree of the chancery court, becomes a *quasi* party to the cause so far as relates to the rights and duties that properly appertain to his purchase under the decree, and hence if he fail to pay the purchase money or any part thereof at the time it becomes due, the court may, upon motion, and without any notice to him, enter judgment and award execution against him for the purchase money remaining unpaid.

This was a judgment rendered upon the facts stated in the opinion, at the April Term, 1852, of the chancery court at Gallatin, Chancellor RIDLEY, presiding; from which the defendants appealed.

JOHN J. WHITE, for plaintiff, argued: It has been decided by this court in the case of *Deaderick vs. Smith*, 6 Humph., 146, that the court has the power to enforce its own decrees; that it has under its control all the sales made by its order until a final disposition is made of the cause; that the purchaser at a sale is a party to the cause, and that his securities by their undertaking become subject to all his liabilities. To be sure, in the statement of the case, it appears that notice was served upon the parties; but the court do not decide the case upon that ground.

This court, in another case, 8 Humph., 520, say that where the purchase is made on a credit, the court will, upon application, see that the money is fairly paid to those entitled, before the purchaser will be invested with the title. See, too, 10 Humph., 81.

MUNDAY, for defendants, argued: *Has a chancellor power to decree* the payment of the purchase money, at a sale made under a decree in chancery, and award execution against the purchaser and his sureties, *where*

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notice has not been given the parties, nor an order made upon them to pay the money into court, by a specified day, or on failure to do so, the court will be moved for a decree and execution, against them to force the payment of the same? We insist that the chancellor has no such power, either by the *acts of assembly*, or by the powers which are "*properly and rightfully incident to a court of chancery*;" that such is not the *regular practice of a court of chancery* in this country, or elsewhere; that it cannot be sustained by the analogous practice in the chancery court of England, when proceeding in similar cases; that *in point of fact*, the plaintiffs in this case had no notice of the proceeding, *until after the decree was pronounced* and execution awarded. *Deadrick et als. vs. Smith et als.*, 6 Humph., 138; *Woods vs. Mann*, 3 Sumner's Rep., 318.

TOTTEN, J., delivered the opinion of the court.

The defendants executed to the plaintiff, as clerk and master of the chancery court at Gallatin, two notes for two thousand three hundred and eleven dollars each; the same being for the purchase money of land sold by the clerk and master under a decree of that court.

On the 12th of April, 1852, on motion and without formal notice, the said court rendered judgment against defendants for a balance of three thousand five hundred dollars due on said notes, and awarded execution; whereupon, the defendants appealed to this court.

The error assigned is, that no notice of the motion was given to defendants. This judgment is supported by *Deadrick vs. Smith*, 6 Humph. R., 146, where the powers of a court of chancery, in this respect, are clearly

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and fully stated. It is true that no notice was given in that case; but it is not alluded to in the opinion as being necessary to the exercise of the jurisdiction aforesaid.

The court must have power to enforce its judgments and decrees. "It has under its control all sales made by its order, until a final disposition is made of the cause." The purchaser of property becomes a *quasi* party to the cause, so far as relates to the rights and duties that properly appertain to his purchase under the decree. He may, therefore, by petition merely, as a party already in court, and without formal bill, present any matter in relation to the sale, that his rights and interests may require; *Read vs. Fite*, 8 Humph. R., 328; as that a title be made to him on his compliance with the conditions of the sale, or that he be absolved from his contract, by reason of defect of title, and the like; so, on the contrary, is he liable to the action of the court to enforce the compliance with the conditions of the sale. This may be by proceeding *in personam* in conformity to the practice of chancery in England, (2 Madd. Ch. Pr., 402,) or by judgment and execution as in cases at law under a statute of the State, 1787, ch. 22.

Now, as the purchaser under a decree becomes a party to the suit, as to every thing that relates to the sale, he is already before the court, as another party is before it, to demand his rights or to perform his duties and obligations in relation thereto. The notice, if given, could only be necessary and have the effect to bring him before the court, and as he is already before it, the notice is useless. It must follow, that in such case, a judgment without formal notice is valid.

It is argued that the practice may be inconvenient where the purchaser has defence, and is not present at

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the rendition of the judgment; as, where payments have been made or the title is defective. But this defence he may still make by petition to the chancellor, and the judgment will not preclude him from taking such action as the equity of the case may require. Besides, it may in many instances be inconvenient or impossible to give notice to the party, and we are not to presume that, as a purchaser merely, he has a solicitor in court to whom the notice may certainly be given. If there be any objection to, or compliance with the sale, the purchaser should make it in reasonable time; if none, he should comply with its conditions, and his contract is sufficient notice to him of the time and nature of its performance, and for which he has become liable to the action of the court.

'Tis true, that the Act 1832, ch. 92, in relation to sales by order and decree of the county court, requires that five days' notice be given before judgment in that court for the purchase money. But this is a special jurisdiction conferred by the statute, and it provides the manner in which it shall be exercised. It has no reference to the more appropriate proceeding in chancery, and requires no notice in that court, which is but another argument in support of the position that we should not require it.

Affirm the judgment.

SNELL *et al.* vs. THE STATE, *for the use of* GREENFIELD.

DILIGENCE. *Of officer in preservation of property attached or levied upon.* An officer who has seized property by virtue of an attachment, must use such ordinary diligence in preserving it, (so long as he should retain the custody of it,) as belongs to a prudent and honest discharge of his duty; but what shall amount to the degree of care and diligence required, must depend very much upon the facts of each case.

This was an action of debt, as stated in the opinion, instituted in the circuit court of Davidson county. At the June Term, 1852, MANEY, Judge, presiding, there was judgment for the plaintiff, and the defendant appealed in error.

REID, for plaintiffs in error, cited *Sto. Bailments*, §§ 124, 130, 620-1; 1 *Mason's Rep.*, 100-1.

EWING & COOPER, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

This action is on the official bond of L. E. Temple, late a constable of Davidson county, against Snell & McGavock, his sureties, for negligence of the said constable in the performance of his office. The case is this. In July, 1850, an original attachment in favor of Wesley Greenfield vs. John E. Jones, for one hundred and seventy-five dollars, came to the hands of Temple, as constable, to be executed. He returned the attachment as levied on a lot of furniture; and the plaintiff avers, that when he obtained his judgment and order of sale thereon, the said constable had been so careless and negligent in keeping the possession of the said property attached, that it was not to be found; and by reason thereof, he had lost his debt.

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There is proof upon the question of diligence, as to the possession of the property, and the manner in which it was kept by the officer, which need not be particularly stated. It appears, however, that the property was not removed, but left in charge of the officer's agent, in the ware-house, where it was found, and which had been used and occupied by the debtor. It does not appear what went with the property. His honor, the judge, instructed the jury, that "if they should find that the goods were lost, and that Temple had used only ordinary diligence to keep them safely, the defendants would be liable for their value." The verdict and judgment were for the plaintiff, and defendants have appealed in error to this court.

The question arises upon the correctness of the charge. The degree of care and diligence, which an officer shall employ in the preservation of property, attached or seized in execution, seems not to be very distinctly defined in the reported cases at common law. Certainly it is the duty of an officer, upon the levy of an execution or attachment, to take possession of the property; and if a bond be not given, as allowed by statute, to retain and keep possession and dominion over it, so that it be subject to answer the writ. He may, also employ his deputy or other agent, to aid in securing and preserving the property, thus taken into his possession, being himself responsible for the proper diligence of his agent. He cannot leave the property in the possession of the debtor, where no bond is given, without the imputation of culpable negligence. It is said, indeed, that he should remove it, and this seems to be generally true; (*Watson on Sheriffs*, 188;) but in some cases, it might be impossible, or injurious, and it must depend

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upon the facts in the special case. He must, however, retain his possession and dominion over it in person, or by his agents, whether he remove it or not; for the property is considered as in *custodia legis*, as it cannot be so if it be not in the custody of its officer.

We may further observe in reference to the diligence which an officer is bound to employ, that in *Fly vs. Finch*, Cro. Jac., 514; *Mildway vs. Smith*, 2 Saund. R., 344; and *Clark vs. Withers*, 2 L. Raym., 1075, it is held as settled law, that it is no excuse for the sheriff, that goods taken in execution, are rescued by force, from his possession. The reason is, that he may summon the *power of the county*, to prevent the rescue, and to recover the possession; and his omission to do so is to be considered a gross neglect of official duty.

This has ever been the rule of the common law, founded on necessity and policy. In 1 Mason R., 100, Mr. Justice Story says: "In respect to property, in the custody of officers of the court, pending process, they are undoubtedly responsible for good faith and reasonable diligence. If the property be lost or injured, by a negligent or dishonest execution of their trust, they are liable in damages; but, they are not, of course, liable, because an embezzlement or theft is proved." And in his work on bailments, he further says: "The degree of diligence which officers of the court are bound to exert in the custody of the property, seems to be such ordinary diligence as belongs to a prudent and honest discharge of their duties, and such as is required of all persons who receive compensation for their services." Story on Bailments, § 62. So, in *Trigg vs. McDonald*, 2 Humph. R., 386: a sheriff must exercise "reasonable diligence to execute the writ." And in *Harewell vs. Worsham*, *Ib.*,

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528, it is said, he shall use active diligence in the execution of process; and if defendant have property, he must levy the execution on, or, show some reasonable excuse, why he did not." All which seems to imply, that he shall exercise such ordinary diligence as belongs to a prudent and honest discharge of his duty.

This, we think the true rule. And it is in accordance with the analogies of the law in other cases. Certainly the officer is not bound to answer the safety and preservation of the property, as in case of a common carrier. Nor, are we aware of any principle upon which a higher degree of diligence may be demanded of him, than that before stated.

Now, what shall amount to the degree of care and diligence required, must depend very much upon the facts of each case, having regard to the legal principle defining its proper degree. Testing the charge by the rule here stated, it will be seen that it is erroneous.

The judgment will be reversed, and the cause remanded for a new trial.

Judgment reversed.

VAUGHN *vs.* DOTSON, *adm'r., &c.*

NEW TRIAL. *Misconduct of juror.* The defendant during a recess of the court, invited one of the jurors trying the cause to which he was a party, to take a glass of soda with him, and also to dine with him at a hotel, which the juror did, the defendant paying the charges. Nothing was said to the juror about the suit; he and the defendant were neighbors and in the habit of doing mutual favors, and, notwithstanding this, he was in favor of rendering a verdict for the plaintiff, but by consent of the parties the verdict of a majority of the jurors was taken as the verdict of the jury, they not being able otherwise to agree, and thus a verdict was rendered for the defendant. Such facts constitute no reason why the verdict should be set aside, and a new trial awarded upon the application of the plaintiff.

This was an action of debt in which verdict and judgment were rendered, as stated in the opinion, for the defendant, at the June Term, 1852, of the circuit court for Davidson county, MANEY, Judge, presiding.

REID, for plaintiff in error, cited Graham New Trials, 96; 6 Greenl. Rep., 140; 5 New Ham., 91; 12 *Ibid.* 474; 5 Pick. Rep., 296.

EWING & COOPER, for defendant in error, cited 19 Maine Rep., 303; 30 *Ibid.* 9; 8 Yerg. 507; 4 Humph., 38.

TOTTEN, J., delivered the opinion of the court.

The action is debt upon an account for work and labor. The verdict for defendant, and plaintiff's motion for a new trial being overruled, he appeals in error to this court. The motion for a new trial is supported by the affidavits of the plaintiff and William Brinkley, one of the jurors.

It appears that after the evidence was closed and the plaintiff's counsel had addressed the jury, the court took recess for dinner; whereon, the defendant invited said

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juror to take a glass of soda with him, and to dine with him at the "Union Hall," which the juror did, the defendant paying the charges. The juror states that nothing was said about the suit; that it did not occur to him that his conduct was improper; that he was in favor of a verdict for the plaintiff, but by consent of parties in open court, the verdict of a majority was taken as the verdict of the jury, they not being able otherwise to agree; that the juror and defendant were neighbors, were very intimate and in the habit of doing mutual favors.

It is now insisted that the court erred in the refusal to grant a new trial; and it is argued that the conduct of defendant, if not designed, had at least a tendency to seduce the juror from his duty, and that the verdict in favor of the party will be set aside as a punishment for his improper conduct, though it may appear that it had no effect upon the mind of the juror. To support this position, we are referred to *Page vs. Wheeler*, 5 New Ham. R., 91; *Hix vs. Drury*, 5 Pick. R., 301; *McIlwain vs. Wilkins*, 12 New Ham. R., 476.

The rule to be deduced from these and other cases, seems to be, that if a party do an improper act, with the design to bias and influence any of the jurors, their verdict in his favor will be set aside as a punishment to him; and no enquiry will be made whether the improper act prejudiced and tainted the verdict or not. The mere attempt to tamper with the jurors and to corrupt them, though it be not successful, shall have the effect to vitiate a verdict rendered in his favor. The rule is founded in public policy, the better to preserve the purity of the trial by jury. 12 New Ham. R., 476; 5 New Ham. R., 92; 17 Maine R., 303; 1 Ld. Raymond, 148. But if the act done was a mere accident or inadvertence, without

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any improper design; and if it can be safely assumed that it had no improper influence upon the mind of the jurors, in such case there can be no just or reasonable ground to disturb the verdict. *Ibid.*

The rule of the ancient common law, that if jurors eat or drink at his charge for whom they afterwards find, it will set aside the verdict, (3 Comm., 375,) must be taken and understood with this qualification.

Now, in the present case, conceding that the act of the party and the juror was improper and censurable, yet we are satisfied that it was the result of inadvertence merely, and that there was no design to bias the juror or seduce him from his duty. It is equally plain, that it had no effect to taint or infect the verdict, as the juror was in favor of a verdict for the other party.

Certainly we have no intention to relax any rule that may be necessary to protect and secure the purity of the trial by jury; but it must be conceded that the strictness of the early English practice on this subject is unnecessary, unreasonable and inconvenient, and that a more liberal practice has long been adopted, both there and in most of the States of this Union. 3 Bl. Com., 375; *Stone vs. The State*, 4 Hum. R., 38; *McLean vs. The State*, 10 Yerg. R., 241; *Handy vs. Call*, 3 Maine R., 17.

Being satisfied with the verdict in the present case, we order that the judgment be affirmed.

Judgment affirmed.

DUNCAN, *ex'r. &c.*, vs. DUNCAN *et als.**WIDOW. Construction of statutes exempting personal property from execution.*

The Act of 1833, ch. 80, which declares that the articles exempt from execution sale in the hands of poor persons, shall also be exempt from execution in the hands of a widow of a deceased debtor, only provides that the widow shall hold the exempted articles against the execution of the creditor, and no right is conferred upon the widow except as against the creditor who seeks to levy his execution upon the property of his deceased debtor. The Act of 1842, ch. 42, § 2, forms an exception to this rule, but it is limited in its operation to the articles specially named and exempted in the act.

Upon the hearing of the bill filed in this case in the chancery court at Lebanon, chancellor RIDLEY, at the January Term, 1853, decreed as stated in the opinion; whereupon, the respondent appealed.

W. L. MARTIN, for complainant, cited the various statutes exempting property from execution, and insisted that the widow is entitled only to the articles exempted by the Act of 1842, ch. 42, § 2, unless it appear that the husband's estate is insolvent.

STOKES, for respondent, cited 9 Humph., 179; 1 Humph., 390; Meigs' Dig. § 968.

TOTTEN, J., delivered the opinion of the court.

The plaintiff, executor of Edwin Duncan's will, who died in 1852, brought his bill in chancery for the construction of said will, and also for an order directing a sale of the personal estate of the testator.

The defendant, Alcy Duncan, the widow of the testator, and who dissented from his will, answers the bill; and in reference to the sale of the personal property, she

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claims as widow of the deceased, all his personal property exempt from execution under the poor laws of the State. The chancellor decreed that, *as widow*, she was entitled to the property exempt from execution by the Act of 1842, ch. 42, § 2, and *no more*. We concur in the chancellor's opinion.

Several statutes, commencing with 1820, ch. 11, exempt from execution certain articles in the possession of poor persons deemed necessary for their ordinary subsistence and convenience. By the Act of 1833, ch. 80, they are so exempted from execution in the hands of the widow of the deceased debtor. The policy of these acts is obvious and humane. The creditor is not permitted to take from his indigent debtor, or if he be dead, from his widow, such articles enumerated in the acts as were deemed necessary to the subsistence of the debtor or his widow; and therefore, these articles are expressly exempted from execution. These persons may hold the exempted articles against the execution of the creditor; that is all, and no right is conferred upon the widow by these acts, except as against the creditor who seeks to levy his execution upon the property of his deceased debtor. The widow takes no right in this respect as against legatees and distributees of the deceased. These stand in equal right, so far as the poor laws here relied upon are concerned.

It is true that the Act 1842, ch. 42, § 2, forms an exception to the rule here stated, but it is limited and confined in its operation to articles specially named and exempted in that act. It was construed in *Curd vs. Curd*, 9 Humph. R., 179, not as being in *pari materia* with the other acts referred to, but as containing a novel and peculiar provision for the benefit of the widow, unlike the provision made for her in the former acts on

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the same subject. The case of *Curd vs. Curd* rests upon the plain and imperative words of the statute.

Let the chancellor's decree be affirmed.

WOOLMAN vs. THE STATE.

PEDLAR. *Defined.* A pedlar is one who travels about the country on foot or in some kind of vehicle, or in any other manner, and sells goods or small commodities by retail.

REVENUE. Merchant. *Articles manufactured in this State of imported goods.* A merchant who has imported cloth into this State, manufactured in another State or country, has paid the regular merchants' tax upon it, and made it into clothing, cannot sell the clothing in any county in the State as a pedlar without such license as is required by the revenue laws to be issued to pedlars; though he may, as a merchant, sell the clothing without additional taxation.

Upon the facts agreed, which are stated in the opinion, a judgment was rendered in this case in favor of the State, at the May Term, 1852, of the circuit court for Wilson county, DAVIDSON, Judge, presiding; the defendant appealed in error.

E. H. EWING, for plaintiff in error.

ATTORNEY GENERAL, for the State.

HOUSTON, Special J., delivered the opinion of the court.

This is a proceeding instituted by distress warrant, issued by the clerk of the county court of Wilson county, against the goods of the plaintiff in error, for

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a violation of the revenue laws, by selling goods in Lebanon as a pedlar without a license. The case was taken to the circuit court by certiorari, where the judgment complained of was rendered in favor of the State. No objection is taken to the manner in which the proceeding was instituted, and the case comes before us upon an agreed statement of the facts, as follows:

"The defendant, at the time stated in the writ, did sell articles of ready made clothing, made out of broad-cloth, &c., on the public square in Lebanon, without any license, which he brought from Nashville, in a carryall. But said clothing was all made by mechanics in Nashville in the house of Brockway, for whom defendant was acting under wages. The cloth of which the articles of clothing were made, was not manufactured in this State."

We think it clear, from this statement of the facts, that the plaintiff in error was engaged in the business of peddling. By the term pedlar, we understand one who travels about the country on foot or in some kind of vehicle or in any other manner, and sells goods or small commodities by retail.

But the facts agreed, present the question, whether or not a merchant, who has imported into this State cloth manufactured in another State or foreign country, has paid the regular merchants' tax upon it and made it into clothing, can then sell the clothing in any county in the State, as a pedlar, without a license?

The constitution of the State, Art. II, § 30, provides that, "no article manufactured of the produce of this State shall be taxed otherwise than to pay inspection fees." This provision is plain and admits of no argument to make it plainer; and, if the articles sold by

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the plaintiff in error had been manufactured "of the produce of this State," a different and a much more difficult question would have been presented. But the cloth or materials of which the clothing sold, was made, was not manufactured in this State, nor was it "of the produce" thereof. This case, then, does not, in any respect, come within the provision of the constitution, as above quoted, and the legislature has full power to lay a tax upon such articles or upon the sale of such articles, at their discretion: moreover, the legislature has express power under the constitution, (Art. II, § 28,) to tax pedlars in such manner as they may from time to time direct. And this power has been exercised by the legislature.

By § 4 of the act of 1835, ch. 13, it is provided that "each and every hawker and pedlar, not exempted by law, whether in clocks or merchandize, shall pay annually a tax of twenty-five dollars on every wagon or vehicle employed in the transportation or conveyance of goods, wares and merchandise or clocks, or by him employed in peddling and hawking in each and every county." And by § 8 of the act of 1848, ch. 161, it is provided that, "every pedlar shall take from the clerk of the county court of every county in which he travels and offers his goods for sale, a yearly license, for which he shall pay twenty dollars, if he travel on foot or on horseback, thirty dollars if he travel in a vehicle, and thirty dollars for each vehicle if he uses more than one." Here is a clear and explicit exercise of the power of the legislature upon this subject. But it is argued that under the revenue laws of the State, the plaintiff in error was not bound to take a license from the clerk of the county court of

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Wilson county, that the goods which he was selling were of the manufacture of Tennessee, and therefore free of taxation of any kind or in any mode, as well in the hands of the pedlar, as in the hands of the manufacturer or merchant. We have seen that he was not clothed with any constitutional exemption by reason of the character of the articles in which he was dealing. We concede that the legislature has the power to exempt from taxation the exercise of this particular kind of traffic, but the question arises, has this been done by the legislature?

To answer this question, it is not necessary to examine any statute enacted previous to the act of 1850, ch. 22, as that is the act which controls this case. The 4th section of this act repeals the 6th section of the act of 1848, ch. 161, and enacts "that articles of the growth and manufacture of this State, and cotton and tobacco, in bales and hogsheads, are hereby exempt from taxation," &c. Now this provision is substantially the same as the provision in constitution to which we have referred, and means what its terms clearly import, that the articles to be exempt from taxation must be both the growth and the manufacture of this State; in other words, "the manufacture of the produce of this State." But the goods sold by the plaintiff in error, not being of this character, are not embraced by the act of 1850.

But even if we were to construe the act of 1850 to mean the growth or manufacture of this State, still the plaintiff was bound to procure a license from the clerk of the county court of Wilson county, because he was embraced by the terms of the acts of 1835 and 1848, and no exemption in his favor, by reason of the character of his goods, is contained in any act of assembly

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upon this subject; and upon grounds of sound public policy this ought to be so. It was intended by the framers of the constitution and by the legislature, that taxation upon pedling should be a source of revenue to the State, and if the merchant be permitted to make up his goods into articles of clothing, and retail them in any county in the State without a license as a pedlar, this source of revenue would be entirely broken up and destroyed; and it was never intended by the legislature, that when the merchant quits his legitimate business of merchandizing and assumes the character of pedlar, by traversing the State and retailing his goods from his wag-gons or carryalls, through each county, on the road side, at private dwellings and in the country villages, that he should not be taxed as a pedlar.

We think a merchant may sell articles of the growth and manufacture of this State, free of taxation. He may also make up his cloth imported from another State into clothing, and sell as a merchant in its improved state, free of any additional tax; but he cannot do so as a pedlar without a license, according to law, as in other cases. We give no opinion as to the question whether a merchant or manufacturer may lawfully sell, as a pedlar, articles manufactured of the produce of this State, without license. That question is not directly raised in this record, and we only decide the questions properly before us.

We see no error in the judgment of the court below, and order that it be affirmed.

SHADDON vs. KNOTT.

SALE OF PERSONAL PROPERTY. *Delivery. Purchaser without notice.* A sale of personal property may be effectual to pass the title to the vendee, as against a subsequent purchaser, without notice, though the vendor be permitted by the vendee in the first instance, to retain the possession of the property.

REPLEVIN. *When a proper action.* *Act of 1846, ch. 65.* The action of replevin will lie, in all cases where the plaintiff has a present right to the possession of any personal property, in the possession of the defendant.

This was an action of replevin in the circuit court of Maury county. At the September Term, 1852, MARTIN, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

PAYNE, for plaintiff in error, cited act 1846, ch. 65; 8 Humph., 609; 9 *Ibid.*, 741; 10 *Ibid.*, 378; 3 New Hamp., 183; 16 Mass., 146; 1 Dallas, 139; 6 Binney, 2.

M. S. FRIERSON, for defendant in error, argued: Suppose the sale from Halcomb to the plaintiff, of the brown mare, was absolute and unconditional, and Halcomb, by agreement, was permitted to retain the possession, although we admit, as between the parties, a contract of sale is complete without the *delivery*; but, as to a *second* purchaser from the seller, who has no notice of the *first* sale, a *delivery* is necessary, for the reason that the *first* purchaser thereby enables the seller to practice a fraud upon the *second* buyer, and cannot take advantage of his own wrong by demanding the property sold to the *second* purchaser, who has innocently paid his money for, and attained *possession* of the thing sold. 1 Domat., §§ 259-278; 5 Shepley's R., 162; 17 Serg. & Rawles R., 99; Pothier on Sales, § 320; 1 Bouv. Institutes, § 952.

The action of *replevin* in England, is founded on the statute of Westminster, 2; and in this State upon the

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express enactment of 1844, ch. 65, and is given for precisely the same causes for which it might have been maintained at common law. At common law, it could only be maintained for two causes. First, for the "*caption*," or tortious taking the goods and chattels of another; second, for the unlawful and illegal "*detention*" of the goods and chattels of another against "gage and pledge." The act of 1846, also gives the action of replevin in two specified cases. First, for the "*seizure*," or, for wrongful taking the goods and chattels of another; second, for the illegal "*detention*" of the goods and chattels of a third person. Thus, by simply comparing our statute with the common law, we at once see that the action can only be maintained under our statute, for the same causes for which it could have been maintained at common law, although the mode of *procedure* is entirely different. 2 Reeves' Eng. L., 46, 47; Bl. Com., 145, 151; 10 Hum. R., 378.

1. Then, what is the legal signification of the term, "*caption*," at common law, and the word, "*seized*," in the act of 1846? It is manifest they mean the same thing; that is, that the original *taking*, or *obtaining* possession of the goods and chattels of another, was *wrongful*, was *tortious*; and such has been the uniform course of decisions, both in England and in this country. *Meaney vs. Head*, 1 Mason's R., 319, 322; 1 Sch. & Lefr. R., 320, 324; 2 Murphy's R., 357; 7 Johnson's R., 140; 4 Bing. R., 299; 3 Stephen's N. P., 2482, (note,) 2484.

2. Then, what is the legal interpretation which has been placed upon the word "*detention*," when applied to the action of *replevin*? It means that character of *holding*, or *detaining* the goods and chattels of another, which will render the party liable as a trespasser *ab initio*.

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Some positive act contrary to the authority or license conferred by law, and under which he took the goods and chattels. The taking being just, but the holding tortious and unjust. 5 Barn & Cress, 485; 11 New Hamp. R., 363; 1 Smith's L. C., 162; 10 Johnson's R., 253, 369; 1 Mason's R., 319; 3 Bl. Com., 151.

3. That the term "*detention*," in the act of 1846, was intended to apply to that character of holding and detaining goods and chattels, which would render the defendant liable as a trespasser *ab initio*, is fully supported by the tenth section of the act of 1846, which requires the plaintiff to make oath, that the goods and chattels which he proposes to *replevy*, are not subject to "*seizure*," or "*execution*," substituting in this section, the word, "*execution*," for "*detention*," thereby showing, that where the term, "*detainer*," is used in the statute, the legislature meant a "*detention*," under color of legal authority, or license; the abuse of which, would render the party liable as a trespasser from the beginning. For, unless the affidavit states that there was a "*seizure*" of goods, which were not subject to "*seizure*," or that goods were taken in "*execution*," which were not liable to "*execution*," no writ of *replevin* could issue; both of which causes imply a *tortious* or *wrongful* taking. 9 Conn. R., 140; 10 Conn. R., 75.

4. Consequently, wherever the plaintiff *voluntarily* parts with the possession, or in cases of *bailment*, or where the defendant is in the *rightful* possession under a contract, and cannot be sued as a trespasser, the "*detention*" is not such as will sustain an action of *replevin*, although the *holding*, or *detention*, may be in violation of his contract, and for which, the plaintiff could maintain an action of *trover*, or *detainer*. *Meaney vs. Head*,

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1 Mason's R., 319, 322; 3 Stepens' N. P., 2830; 4 Bing. R., 299; 10 Humph., R., 378; 2 Chitty's Pl., 843; 4 Bouvier's Institutes, §§ 3537, 3559.

CARUTHERS, J., delivered the opinion of the court.

This action of replevin was brought for a brown mare, worth sixty dollars. The mare was sold by one Holcomb, to the plaintiff, but left with the vendor for the use of his family. Sometime after, Holcomb procured an auctioneer to sell the mare for him, and she was bought by Tate, who sold her to the defendant. It does not appear that the defendant had any knowledge of the purchase of the plaintiff.

The judge charged the jury, first, that a sale of this kind of property, is good, even without delivery of possession, against a subsequent purchaser, without notice; and, secondly, "that an action of replevin will not lie, unless there was a trespass committed in the taking of the property, where the action is brought for the seizure; or where brought for the detention, the detention must be wrongful, or tortious, and under such circumstances as will make the holder a trespasser from the beginning. If the jury shall find, from the proof, that the defendant came to the possession by purchase from one claiming the title, and having the possession, and the same was delivered to him by virtue of his purchase, then the obtaining possession would not be a trespass on the part of the defendant, so as to sustain the action of replevin; nor, would his subsequent holding or detention, make him a trespasser from the beginning, at the common law, or under the statutes; and in that event, replevin

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would not be the proper action, but the plaintiff must resort to his action of trover, or detinue."

The jury found for the defendant. From the judgment of the court, overruling a motion for a new trial, the plaintiff appealed to this court.

The argument here, has been made upon the charge of the court on both points. We think his honor was right on the first proposition; that is, that a sale of personal property, other than slaves, complete in all its parts, where nothing more remains to be done by either party, passes the right to the property, without the possession being changed, against all the world. Though there are some authorities in conflict with this position, yet, we consider the preponderance greatly in its favor. Chitty on Con., 274-5; 6 Dana, 48; 7 *Ib.*, 59; 24 Maine, 366.

In *Potter vs. Coward*, Meigs, 22, the same principle is stated, in these words: "A sale of chattels is complete, as soon as both parties have agreed as to the terms." The same rule applies to a contract of barter or exchange, as to a sale for money. In these cases, the right to the possession, as well as the property, is perfect in the vendee, and any loss which may occur after that time, by death, or injury of the property, falls upon him. It is true, that the retention of possession in such a case, raises a rebuttable presumption of fraud, but is not fraud in itself. It merely throws upon the claimant, out of possession, the necessity of proving the transaction was fair, in which his title originated. Chitty on Con., 410, note 1; *Callen vs. Thompson*, 3 Yerg., 475. So, upon this point, we think the law was correctly charged. But on the second point, we think his honor erred. It is true, that at common law, and perhaps in some of our states.

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the action of replevin is confined to the cases designated by him; and we would, perhaps, concur in the propriety of so limiting it here, as a legislative question. But we are of the opinion, that our act of 1846, ch. 65, Nich. Sup., 243, gives it a broader range. By § 1, of this act, the action of replevin is given: "When the goods or chattels of any person may be seized, or *detained* by another, * * * in violation of the right of such person, * * * and against his will." In § 12, it is provided, that where the property cannot be found by the officer having the writ of replevin in his hands, but he returns that he has made known the contents of the writ to the defendant, the plaintiff may elect to declare against the defendant in trover, or detainer, and proceed to final judgment, without any other summons, and the suit shall be in every respect, conducted as if the writ had been in either of those forms of action. Upon a fair construction of the whole of this act, and by it, judging of the intention of the legislature, we are constrained to decide that it will lie, in all cases where the plaintiff has a present right to the possession of any personal property in the possession of the defendant. In all such cases, the property is unlawfully *detained* from the plaintiff, by the defendant, and therefore, falls within the plain language and meaning of the act. Whether it should be so or not, as a matter of sound policy, is a question for the legislature, and not for the courts; but in expounding the act, which is the extent of our power and duty, we can only regard the action of replevin as a substitute for the action of detinue, and that it is co-extensive in its application. We can easily see how the act might be very much abused, by changing the possession of property, upon groundless claims, during

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the pendency of protracted litigation; where, perhaps, the most proper and just course, would be, to leave the possession undisturbed, except in cases of violent and wrongful taking, by officers, or others, until the right should be legally settled. But such are not the provisions of the act, as we understand them, and any alteration, or amendment, must come from the law-making power.

We, therefore, for this error in the charge of the law, reverse the judgment of the court below, and remand the cause for a new trial, when the law will be charged as here declared.

WHYTE *vs.* MAYOR AND ALDERMEN OF NASHVILLE.

DOWER. *Character of the estate and charges to which it is liable.* There is nothing peculiar to a tenancy in dower, which distinguishes it, with respect to taxes and other incidental charges upon the property, from other estates of freehold for life. Standing in the place of her husband, the doweress must necessarily be held subject to the charges, duties and services to which the estate may be liable. She is seized of the freehold, and is, properly speaking, *owner* of the estate to the extent of the assignment in dower.

CORPORATION. *Constitutional law.* The cases of *Mayberry vs. The Corporation of Franklin*, 6 Humph. 368, and *Washington vs. The Mayor and Aldermen of Nashville*, 1 Swan, 177, re-affirmed.

SAME. *Powers. Nashville.* The powers conferred upon a corporation must be exercised in conformity with the law of its creation; and hence the corporation of Nashville has no power to delegate to any one or more members of the board of Aldermen, authority to give notice, to such citizens as they may select, to construct foot pavements in front of their lots, and in the event of failure to make such pavements within the time fixed by a by-law of the corporation, to have them made at the expense of the owner of the lot. This is a power conferred upon the corporation which cannot be delegated.

This was an action instituted in the circuit court of Davidson county, upon the facts stated in the opinion

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At the May Term, 1852, MANEY, Judge, presiding, there was judgment for the plaintiff, and the defendant appealed in error.

WASHINGTON, for plaintiff in error, argued that Mrs. Whyte was not the owner of the property as tenant in dower, and that the notice should have been given both to the tenant in dower and to the heirs; and if the notice was properly given to Mrs. Whyte, it should have been predicated upon some specific action of the board of Mayor and Aldermen.

EWING & COOPER, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This action was brought to recover from Mrs. Whyte the amount expended by the corporation in the construction of a foot pavement in front of the lot occupied by her as a residence.

It appears that, on the 27th of October, 1848, a notice was served on Mrs. Whyte, signed by S. V. D. Stout, "chairman of the street committee," requiring her to make a pavement in front of said lot, on or before the 30th of November ensuing; and informing her that on failure to do so, said pavement would be made pursuant to the laws of the corporation, and the amount paid therefor charged against the *owner* of said lot.

Mrs. Whyte disregarded this notice, and the corporation, in April, 1850, proceeded to have the pavement made, the cost of which amounted to three hundred and twenty-eight dollars and seventeen cents.

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The lot, in front of which the pavement in question was made, was part of the estate of the late Judge Whyte, who died in 1844, and was assigned to the plaintiff in error, who is widow, as part of her dower of said estate, by a decree of the chancery court at Franklin in October, 1846, and has been occupied by her ever since.

The charter of incorporation confers upon the "Mayor and Aldermen of the town of Nashville," power to regulate foot pavements and side walks in the streets of said town; and further provides that "*if the owner or owners of lots shall fail to comply with the provisions of such by-laws, within such time as may be prescribed thereby,*" the corporation may contract for the construction of such side walks or pavements, and the amount paid shall constitute a charge against the owner or owners of the lots to be recovered against them by suit.

The by-law of the corporation, for carrying into effect the foregoing provision of the charter, provides for the appointment, by the Mayor, at the first meeting in each year, of a standing committee, to be known as the street committee, consisting of six aldermen; and it is made the duty of this committee, among others, to see that the foot pavements and side walks are properly constructed.

The by-law requires that all owners of lots, within the limits of the corporation, shall cause good and substantial foot pavements, to be made of brick or suitable stone, in front of their lots.

And the third section of said by-law, provides, "that if the owner or owners of lots, or their agents, or any of them, shall fail to comply with the provisions

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of this act, *after thirty days' notice*, it shall be the duty of the chairman of the street committee for the time being, and he is hereby authorized to contract with some suitable person, for the construction of said side walks or pavements, and cause the same to be made and paid for by the corporation; and the amount so paid shall constitute a charge against the owners of said lot or lots as aforesaid, to be recovered against them by suit.

Upon the foregoing statement, arise the only questions which we think necessary to be considered in the case.

And first: Is the plaintiff in error, as tenant in dower, subject to the charge sought to be enforced against her in this action and for which a recovery was had against her in the circuit court?

The law in terms makes the charge and gives the action against the *owner* of the lot. And the position assumed is, that as the life interest of the tenant in dower and the reversion constitute the different portions of one estate, and as the improvement enures equally to the benefit of the reversion, this charge cannot be thrown wholly upon the owner of the life estate; that if the latter can be made liable at all, it can only be conjointly with those in whom the reversion is vested.

This position we think untenable. The widow, it is true, has no estate in the lands of which her husband died seized, until assignment of her dower. On the death of her husband, the title descends to the heir, who has the undivided seizin until dower is assigned; but upon this being done, the widow becomes seized of a freehold estate in the portion allotted to her. The fee simple, it is true, remains in the heir, and

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although, in point of tenure, the doweress holds of the heir or reversioner, yet her claim is paramount to the heir. Her estate is a continuation of that of her husband. The assignment does not pass the estate, but ascertains the portion to be allotted as dower; and upon such assignment being duly made, in intendment of law, the doweress is in by relation from her husband's death, and is in of the seizin, not of the heir, which by the assignment is defeated *ab initio*, but of the seizin of her husband; 4 Kent's Com., 61, 69. And, although, for some purpose, the dower interest and the reversion may be regarded as one estate, yet in general they are treated as distinct estates.

The tenant in dower is seized of a freehold estate for life, which, with some qualification, must necessarily be subject to all the incidents of other estates for life.

The general rule is, that the tenant for life, of an estate charged with an incumbrance is bound in equity to keep down the interest, out of the rents and profits. The object of the rule is to make every part of the ownership of real estate, bear a rateable part of an incumbrance thereon, and to portion the property equitably between the parties in interest, when there is a possession; and therefore the tenant for life is bound to contribute during the time of his enjoyment of the estate; 4 Kent's Com., 73, 74.

The tenant for life, upon the same principle, is bound, out of the rents and profits, to keep down all incidental charges upon the land which accrue during the continuance of his estate, as for repairs, taxes and the like: 2 Bouv. Inst., 229.

So inflexible is this rule, that, in England, a private act of Parliament must be obtained, to enable the tenant

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for life to charge the inheritance for the amount of necessary repairs and improvements, which must enure to the benefit of the reversioner or remainderman; Chitty's Bl. Com., book 2, 346, marg., note 2.

In principle, the tenant of the life estate must necessarily be subject to a charge of the character of that in question in the present case, as much as for taxes and other incidental charges. And there is nothing peculiar to a tenancy in dower to distinguish it, in this respect, from other estates of freehold for life; standing in the place of her husband, in respect to the portion of the land assigned her in dower, the doweress must necessarily be held subject to the charges, duties and services to which the estate may be properly liable; she is seized of the freehold, and is, properly speaking, *owner* of the estate to the extent of the assignment in dower. When the charge is upon the entire estate of which the husband died seized, the doweress is, of course, only bound for one-third part of it, because she takes only a third part of the estate; but where, as in the case under consideration, the charge falls exclusively upon a part of the estate which has been assigned in dower, she is separately and exclusively liable for its discharge.

2. The power of the legislature to confer upon the corporation the authority exercised in the enactment of the by-law in question, is denied. This cannot be regarded as an open question. In the case of *Mayberry vs. The Corporation of Franklin*, 6 Humph., 368; and again in *Washington vs. The Mayor and Aldermen of Nashville*, 1 Swan, 177, the constitutional power of the legislature to confer such authority, was declared; to which cases we refer, without repeating the argument.

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3. The remaining question is, whether, in the present case, the power conferred upon the corporation has been exercised in conformity with the law of its creation. The power to charge the owner with the cost of a pavement made by the corporation, is restricted not only by the terms of the act of incorporation, but likewise by the very purpose for which it was bestowed. The provision of the statute is, "that if the owner or owners of lots shall fail to comply with the provisions of such by-laws *within such time as may be prescribed thereby*, the corporation may contract," &c. By this provision, no *notice* is contemplated other than that to be conveyed by the promulgation of a general law of the corporation, applicable to, and operating upon all owners of lots within the limits of the corporation, requiring foot pavements to be made, and prescribing the time within which they shall be made. Such a law, thus promulgated, is notice of itself to all lot owners within the corporation; and, if reasonable in its terms, must be complied with by all at their peril.

The by-law under consideration, requiring pavements to be made by the owners, does not prescribe any time within which such pavements shall be constructed; but as a substitute for this requirement of the charter, enacts that, if the owner or owners of lots shall fail to comply with the provisions of the by-law, *after thirty days' notice*, the chairman of the street committee may contract, &c. As to the manner of giving such notice, or by whom it shall be given, the by-law is perfectly silent; but the practical construction and operation of the law is, as it seems, that the chairman of the street committee, without any order or resolution of the board of mayor and aldermen, either

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general or special, gives the notice to particular individuals in default. In other words, the notice, instead of emanating from the board of mayor and aldermen, as a general requirement, approved by the judgment and discretion of the persons in whom, by the charter, the power and trust are confided, it proceeds, as it would seem, from an irresponsible individual unknown to the charter, and upon whom even the by-law confers no such authority. This is an exercise of the power conferred upon the corporation, wholly unwarranted by the act of incorporation. We do not say that it was not competent to the corporation, instead of prescribing a time in the by-law for making pavements, to provide that they should be made upon reasonable notice; but then some further specific action of the corporation would become indispensable, directing that such notice should be given, and in what manner.

If the corporation ever possessed the power to delegate to an individual member or members the authority to determine what particular owners of lots should be required to construct pavements, and to give notice accordingly, it might suffice to say that this has not been done by the law under consideration. But we do not admit that the corporation possesses any such power. It can admit no doubt that an ordinance or by-law of the corporation, requiring particular individuals, by name, to construct pavements in front of their lots, passing by others who had omitted to do so, would be a nullity. Such an enactment would be partial, oppressive and wholly unauthorized. And if this could not be done directly, it cannot be done indirectly in the manner attempted in the case before us. The power conferred upon the corporation is in trust for the benefit of all the citizens of the town,

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and must be exercised with discretion; and it must be exercised by the persons upon whom, by the act of incorporation, it is conferred; by themselves or under their express directions, as in other cases of personal confidence and trust, when judgment and discretion are required or relied on; Angell & Ames on Corporations, 346, 257. By-laws must be reasonable; and all such as are unequal, oppressive or manifestly unjust, are void: *Ibid*, 347. And whether a by-law is reasonable or not, is a question for the determination of the court; *Ibid*, 357.

It is unquestionably true that, in addition to the incidental powers and capacities tacitly conferred by law upon a corporation, there may also be implied powers, in order to carry into effect the powers expressly granted, or to effect the purposes of its creation; but when the corporation is endowed, by its charter, with power to make a specific by-law in a certain case, and for a certain purpose, its power of legislation is restricted to the case and object specified, and all others being excluded by implication; *Ibid*, 323. Here the power imparted to the corporation, and the manner of its exercise, are expressly defined in the statute and must be strictly pursued.

The result is, that the notice given to the plaintiff in error was unauthorized and a nullity, and therefore she cannot be charged with the sum expended by the corporation in making the pavement in question.

Judgment reversed.

THE STATE *vs.* ALLISON.

COSTS. Motion. A motion against a sheriff, for an "insufficient return," is, in substance, or legal effect, a suit or action, and hence, in such a proceeding, the clerk should include in the bill of costs, the state tax provided by the act of 1848, ch. 161, § 10.

This was a motion to correct the taxation of costs, in the circuit court for Smith county. At the November Term, 1852, GOODALL, Judge, presiding, there was judgment on the motion for the defendant, and the Attorney General, BRIEN, in behalf of the State, appealed in error.

ATTORNEY GENERAL, for the State.

J. B. MOORE, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was a motion to correct the taxation of costs; and the simple question is, whether or not, in taxing the costs, in the case of a judgment, by motion against a sheriff, for an "insufficient return" of an execution, under the act of 1836, ch. 19, § 6, the State tax can be included?

The act of 1848, ch. 161, § 10, imposes a tax of three dollars and fifty cents, on each *suit* in the circuit court; and we perceive no reason why a proceeding by *motion*, should be exempted from this tax.

It has been repeatedly held, that this summary remedy, given by statute, is a substitute for the common law action on the case; and that it is, in substance and legal effect, a suit, or action; 6 Humph., 332-335. In this view, the clerk properly included the State tax in

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the bill of costs; and in ordering that item to be struck out, the court erred.

The judgment will be reversed; and judgment rendered here for the amount of said tax.

McMURRAY, adm'r., et al., vs. MONTGOMERY et al.

TRUSTEE. *Liability of, for abuse of trust by his co-trustee.* A trustee who accepts a discretionary trust, and identifies himself with it by sales and settlements, and by the reception of fees for services, cannot escape responsibility, if he permits his associates in the trust, to keep, use, or appropriate to himself, the trust fund, or a portion thereof.

This was a bill filed in the chancery court at Gallatin, for the purpose, and upon the facts stated in the opinion. At the October Term, 1852, Chancellor RIDLEY, presiding, there was a decree for respondent Montgomery, from which the complainants appealed.

J. A. McMURRAY, for complainants, cited 5 Johns. Ch. Rep., 283; 10 Yerg., 263; 5 Humph., 474; Hill on Trustees, 314; 1 Atkyn's Rep., 356; 4 Ves., 79; 1 Sch. & Lefr., 341; 1 Ves. Junr., 297.

GUILD, for respondent, Montgomery, cited 1 Sto. Eq., § 1280; 1 P. Wms., 83, Cox's note 1; 1 *Ibid*, 241; 3 Atkyn's, 584.

CARUTHERS, J., delivered the opinion of the court.

[*McMurray, adm'r, et al. vs. Montgomery et al.*]

The only question in this case, is, as to the liability of Daniel Montgomery, as co-trustee with James Howard, for the trust fund wasted by the latter. The facts are these: Benjamin Rawlins, on the 21st July, 1825, conveyed a tract of land, and other property, to the said Montgomery & Howard, in trust, for the benefit of his daughter, the wife of Jno. A. Lewis, during her life, and then to be sold, and the proceeds divided equally between her children, as they respectively arrived at lawful age. At the termination of the life-estate, the property was all sold by the trustees, and the notes taken, payable to them jointly as trustees. The sale was made in the year 1829. Both accepted the trust; joined in the advertisement of the sale; were present when it was made; and as the children successively came of age, jointly settled with them, taking the receipts to both, and the commissions charged for the trouble, were divided between them. The receipts, as well as all the other papers and accounts, relating to the trust, except the notes for the land, were kept by Montgomery. All the children, but one, have been paid, and the share of that one, except a small amount due from Montgomery, was in the hands of Howard, who is now insolvent.

Howard changed his residence from the county of Sumner to the adjoining county of Davidson, a few years ago. He was then considered entirely solvent. It does not appear, that the trust fund was ever loaned out by Howard, but it was by him retained and used as his own. Montgomery never had any of the fund in his hands, but about fifty dollars, the amount of purchases made by him, at the trust sale; due proportions of which he has paid out in the successive settlements made with the beneficiaries, as they arrived at age. Nor is it pre-

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tended, that he ever made any efforts to control or look after it, in the hands of Howard. Montgomery did not probably know at the time the deed of trust was made, that he was a trustee, but, on being informed of it afterwards, and just before she died, by Mrs. Lewis, he agreed to accept the trust, and acted in it, as before stated.

Under this state of facts, should he be made liable for money received by his co-trustee? We hold it clear, by well settled principles, that he should. We are aware of no case, where the courts have exonerated a joint trustee, under such a state of facts. To do so, would frustrate the principal, if not the only reason, a man could have for making two trustees instead of one. His aim is, to secure the united ability, watchfulness, responsibility and attention of two trusty men in the business committed to them. If one can, after accepting the trust and identifying himself with it, by sales and settlements, and the reception of fees, be permitted to escape all responsibility, just because he permits his associate in the trust, to keep, and use, and appropriate the means: then, in place of having any advantage from the appointment of two, by way of additional security, the danger and hazard to the fund are increased; at least, no additional security is afforded.

It is true this is what is called a *discretionary trust*, as contradistinguished from a *directory trust*, as by the terms of the trust deed, no particular mode of investment is provided for, but the fund is only to be paid out at a particular time designated in the deed.

It is admitted, that in directory trusts, the rules of accountability of joint trustees for the acts of each other, are more stringent. But it seems very clear to

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us, that the rules applicable to the case of discretionary trusts, when applied to the facts of this case, fix the liability of Montgomery.

In such a case, the general rule is, that in order to charge a trustee for an abuse of his co-trustee, "some act of commission must be shewn, on his part, by which the trust-fund was obtained by his co-trustee; or some act of omission, amounting to gross neglect, in permitting the funds to be wasted." *Morell vs. Morell*, 5 Johns. Ch. R., 287. Chancellor Kent, there lays it down, that the co-trustee is liable, where the money was paid to his companion, by his act, direction, or agreement.

In this case, Montgomery certainly agreed, that his companion, Howard, should receive the money. If not, why did he leave the joint notes with him?

It was certainly an omission of duty on the part of Montgomery, amounting to "gross neglect," to permit Howard to keep and use this fund as his own, for so many years, without ever enquiring after it; or, making any attempt to have it loaned out at interest; safely invested, or otherwise secured.

In the case of *Deadrick vs. Cantrell*, 10 Yerg., 269, 272, this court decided, that, "where executors and trustees are directed to sell the land, and pay the proceeds to legatees, at a future time, if they join in the sale, and agree that the notes shall be made payable to both, and they are so taken, and the fund is afterwards wasted by one, the other is responsible."

"A waste in such a case, could not be committed by one, without an act of omission, or commission by the other." This doctrine is fully sustained in Story's Eq., §§ 1280, 1289.

The decree of the Chancellor, must, therefore, be

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reversed, so far as it exonerates the defendant, Montgomery, from liability for the amount of the trust-fund wasted by Howard, and yet due to complainants; and a decree will be entered against them jointly, for the same.

McELRATH vs. THE STATE.

CRIMINAL LAW. *New trial. Prosecutor mingling with the jury.* A new trial will be awarded a prisoner convicted of manslaughter, if it appear that during the progress of the trial, the prosecutor spent a night in the room with the jury who had been committed by the court to the care of a constable; and in such case the new trial will be awarded though the prosecutor be the sheriff of the county, and all exceptions to the competency of the panel of jurors summoned by him be waived by the prisoner; and though the prosecutor state in an affidavit that he "made use of no means of any sort to influence the jury." In such case, it is not required of the prisoner to show that in fact his rights were prejudiced by the unauthorized interference of the prosecutor; it is sufficient that, from the admitted and unexplained facts of the case, they *might have been* prejudiced.

McElrath was indicted, as stated in the opinion, for the murder of Robert H. Peyton. At the February Term, 1852, of the circuit court of Sumner county, MANEY, Judge, presiding, he was convicted of manslaughter, and sentenced to ten years imprisonment in the penitentiary, from which judgment he appealed in error.

GUILD and TRIMBLE, for the prisoner.

J. S. BRIEN and ATTORNEY GENERAL, for the State.

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McKINNEY, J., delivered the opinion of the court.

The plaintiff in error was indicted in the circuit court of Sumner, for the murder of Robert H. Peyton, and on the trial, at the February Term, 1852, was convicted of manslaughter and sentenced to ten years' confinement in the penitentiary. A motion for a new trial was overruled, and the case is brought to this court by an appeal in error.

The record contains a bill of exceptions, in which the evidence is set forth, and likewise certain affidavits presented to the court on the argument of the rule for a new trial. The counsel for the plaintiff in error have presented several grounds, upon either of which, they insist, a new trial ought to be granted.

It appears from the record, that D. P. Hart, then principal sheriff of Sumner county, was *prosecutor* in this case; and upon his information, the warrant issued for arrest of the plaintiff in error, on the day of the homicide.

It further appears, that, upon a suggestion to the court, by the attorney general, of the incompetency of the sheriff to summon a panel of jurors, by reason of his relation to the case as prosecutor, the prisoner in proper person and by his counsel waived all exception to his competency upon that ground; and thereupon the sheriff was directed to proceed to summon a panel of jurors for the trial of the prisoner.

The trial was commenced on Tuesday of the term and was concluded on Tuesday of the following week. The record shows, that at the adjournment of the court on the first day of the trial, and likewise at the adjournment on each succeeding day, the jury were

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placed in the care of a *constable*, to whom the usual oath was administered to keep them separate from all other persons and suffer no one to have any communication with them.

The affidavit of William H. King, at the house of whose father the jury boarded and lodged, during the progress of the trial, states that D. P. Hart, the prosecutor, "*staid with the Jury, in the same room, the first night after they were empannelled; and he saw him go to the room of the jury several times after that, during the time they were at the tavern.*" To obviate the effect of this disclosure, the affidavit of said Hart was produced, in which, without in the slightest degree, controverting the truth of the statement made by King, he states, that when in the room with the jury, "he made use of no means, of any sort, to influence the decision of the jury; he never would have went into the jury room if he had not thought it was entirely acceptable to the defendant and his counsel; and affiant was mainly induced to go there at the request of the court; affiant thought all his acts would be acceptable to defendant, after he waived the objection to him or his deputies summoning the jury."

Upon the foregoing facts, the question is, whether the conduct of the prosecutor, in intermingling with the jury, constitutes such an irregularity as ought to be held to vitiate the verdict. In considering this question, we must regard Hart simply in the capacity of prosecutor, leaving out of view his official relation and character, as sheriff. By his own voluntary act, in assuming the relation of prosecutor, he thereby disqualified himself, so far as respects this particular case, for the exercise of the proper

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duties and functions of his office of sheriff, preliminary to, and connected with the trial of the case.

We may leave out of view, also, the waiver of the sheriff's incompetency to summon the jury. Passing by the question, whether the court ought not to have relieved the prisoner from the necessity of making such waiver it is very clear that it could have no operation or effect, except to exclude the prisoner from afterwards objecting that the jurors were not regularly summoned. Whether it ought to be held, even to have that effect, is a question which we need not, in the present case, consider; for, be that as it may, the waiver had reference alone, to the summoning of the pannel of jurors, and neither contemplated, nor extended to any subsequent matter, in the course of the trial.

The simple inquiry, then, is: Can it be tolerated that the prosecutor, may, at his pleasure, associate and hold communication with the jury, during the progress of the trial? And this inquiry, it seems to us, admits of no discussion, if the purity of the trial by jury, be deemed worthy of preservation. If the prosecutor may do so, who may not? May not any stranger to the prosecution, or any witness in the case, or any relative of the deceased, thus intrude himself upon the jury? It is true, the prosecutor is not, properly speaking, a *party* to the prosecution; yet he is the party appointed by law, to take all the active steps necessary in order to bring the offender to justice; 1 Chitty's Cr. Law, 1.

His duty to the public imposes upon him the highest obligations, both of reason and law, to exert in a proper manner the power with which he is invested; *Ibid*, 3. But aside from the motives of duty, his responsibilities are of a nature to inspire him with a feeling of personal

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interest in the result of the prosecution. He may be, and frequently is, a witness; his reputation is, in some degree, not unfrequently involved in the issue; he is liable to be subjected to the costs, in the event the court should be satisfied that the prosecution was either frivolous or malicious; and likewise to an action for damages at the suit of the injured party.

It certainly would be an unsafe and rash conclusion, that motives so urgent might not exert a powerful influence upon the mind of a prosecutor, exempt in an ordinary degree from the passions and frailties common to our nature; and what would likely be their influence upon the conduct and feelings of one of opposite character, may be readily conjectured.

But it is said, the affidavit of the prosecutor establishes that, in this case, no influence prejudicial to the defendant was attempted to be exerted over the jury; and therefore, the irregularity, admitting it to be such, should not be allowed to affect the verdict. We do not go the length of holding that the conduct of the prosecutor, however censurable, did not admit of explanation; but, in a case apparently so flagrant, the explanation ought to be very ample and satisfactory and sufficient to exonerate the prosecutor from the slightest imputation of either an intention or attempt, to influence the jury, directly or indirectly. The affidavit before us, waiving for the present the question of its admissibility, presents no such full and sufficient explanation. The jury were, during the entire progress of the trial, under the charge of an officer, for whose conduct the prosecutor, in his character of sheriff, was not responsible. *Prima facie*, therefore, no legal necessity could have existed for the interference of the prosecutor, as principal officer of the

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court. Under the circumstances of this case, it would not have been competent to the court, unless upon some very extraordinary emergency, to have permitted the prosecutor to mingle with the jury; and if such existed, it ought to have been stated, and cannot be presumed. The strong fact, that the prosecutor remained with the jury all the first night, is not attempted to be explained. Why was he there at all? What motive prompted such a gross intrusion upon the privacy of the jury? and that, too, at so early a period in the progress of the trial; just after the jury had been charged with the case, and when first impressions, not derived from the evidence, were all the more likely to produce an erroneous and mischievous effect.

The mere negative statement of the prosecutor, that he "made use of no means of any sort to influence the decision of the jury," amounts to nothing, in the absence of a full and explicit explanation, showing, affirmatively, what were his motives and conduct.

The acts charged and not denied, being in gross violation of duty, and the prosecutor having failed to show that they were prompted by innocent motives or that they could not reasonably be supposed to have been productive of mischief to the defendant, the law implies the contrary. It is not required of the defendant to show that, in point of fact, his rights *were* prejudiced by the unauthorized interference of the prosecutor; it is sufficient that, from the admitted and unexplained facts of the case, they *might have been* prejudiced.

Upon this ground, the judgment will be reversed and a new trial awarded.

TROUSDALE, Gov'r., &c., for the use of *McNichol* vs.
PHILIPS.

EVIDENCE. *Sheriff and surety.* The declarations of a sheriff made after the return day of an execution, cannot be heard as evidence against the surety of the sheriff, in an action against surety alone for the failure of the sheriff to pay over money by him collected upon the execution. Such declarations, to be admissible, must be made at a time and under circumstances to constitute them a part of the *res gesta*.

This was an action of covenant in the circuit court of Montgomery county. At the September Term, 1852, PEPPER, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

HENRY & SHACKLEFORD, for plaintiff in error.

ROBB, BAILEY and KIMBLE, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

This action is brought against Wm. Philips, as one of the sureties of Samuel Boughton, on his official bond as sheriff of Stewart county, for money collected on an execution in favor of Wm. McNichol, and not paid over.

A single question of evidence is raised in the case. The plaintiff offered to prove on the trial, by J. S. James, that while the said Samuel Boughton was sheriff of Stewart county, but after the return day of the plaintiff's execution, that he heard Boughton say "that he had not paid over to McNichol the money he had collected on said execution."

This evidence was objected to, and excluded by the court. This was clearly right. In order to make the declarations and statements of the principal good against

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the surety, in these kind of bonds, they must be made when the business is transacted, and in connection with it, so as to become a part of the *res gestæ*. They can be admitted on no other principle. The surety is bound for the acts and conduct of his principal, and not for what he may say he had done. It being, then, only for the acts of the sheriff, that his surety is bound, these acts must be made out by competent evidence, and not by the declarations of the sheriff at a subsequent time, and unconnected with any official action then transpiring, of which such declarations would constitute a part, so as to fall under the rule laid down in 1 Greenleaf on Ev., § 187, and other sections. In the case of *Young et als. vs. Hare*, 11 Humph., 303, this rule is fully recognized; but the written acknowledgments of Young, that he had received money as clerk of Jackson circuit court, for Hare, as jailor, on sundry bills of cost, were admitted, because that was a motion or proceeding against the officer, Young, and his securities; and being good evidence against him, it could not be excluded.

We think there is no error, and affirm the judgment.

SMITH et als. vs. THOMPSON.

CONSTRUCTION OF WRITINGS. Deed. Trust. Limitation of actions. R. M. Smith conveyed to "William Yancey, his heirs, executors," &c. a negro slave, Jim, and other slaves, in trust for the separate use of the wife of said Smith; the trustee to hire or control the slaves for her interest, and, [in the words of the deed] "after her death the said negroes, with their increase, if any, to be equally divided between all her children." *Held* that where the subject of the trust is personal estate, the deed creating the trust may receive a more liberal construction, conformable to the true and actual intention of the instrument, than is admissible where it is real estate, limited in the technical and artificial language appropriate to that kind of property, and hence in this case the estate of the children, construing the deed by the rule stated, was a vested legal remainder, and upon the death of the tenant for life, the legal estate would cease to be in the trustee, at which time, and not until then, a right of action would accrue to the children to recover the slaves from those who might have them in their possession.

This was an action of trover, in the circuit court of Maury county. At the September Term, 1852, MARTIN, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

PAYNE and HUGHES, for plaintiffs in error.

M. S. FRIERSON, for defendant in error, cited 8 Humph., 563, 568; 9 Humph. 546; 2 Johns. Rep. 221; 1 Greenl. Ev., §§ 523, 526; 1 Ld. Raym., 730.

TOTTEN, J., delivered the opinion of the court.

This is an action of trover for a negro slave, Jim. There was judgment in the circuit court, for defendant, and the plaintiffs appeal in error.

The material facts are these: On the 22nd April, 1826, Robert M. Smith conveyed to William Yancey, his heirs, executors, &c., the negro slave, Jim, and other slaves, in trust, for the separate use of the wife of said

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Smith. The trustee to hire or control the slaves for her interest; and, in the words of the deed, "after her death, the said negroes, with their increase, if any, to be equally divided between all her children."

Elizabeth Smith, the said tenant for life, died about two years before the institution of this suit, and the plaintiffs are her children, provided for in said deed. After said deed was executed, (that is, September 12, 1826,) said Robert M. Smith sold the slave, Jim, to James T. Sandford, and executed a bill of sale, and delivered the slave to him, in absolute property. Some years after, Sandford gave the slave to his daughter and son-in-law, the defendant in this suit, who has ever since held the slave in adverse possession; claiming the same as his property. The trustee lived many years after the adverse possession of Sandford commenced, and whether he is yet living, does not appear in the record. After the death of tenant for life, the plaintiffs demanded the slave, and were refused.

His honor, the circuit judge, instructed the jury, in effect, that the legal title was in the trustee, and only an equity in the plaintiffs; and therefore, they could have no *status* in a court of law. Second, that the legal title being in the trustee, and by the facts of this case, being barred by the statute, the equitable title was also barred. In support of these positions, *Otey vs. Williams*, 8 Humph. R., 563; and *Stephens vs. Bomar*, 9 Humph. R., 546, are relied upon.

These propositions resolve themselves into one; and that is, whether the plaintiffs take a legal title in remainder, under the deed.

This depends, of course, upon the true and proper construction of the instrument. In trusts, created by *will*,

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it is a general rule that the trustee in whom is vested a legal estate, takes such quantity of interest thereon, as the purposes of the trust require; and as soon as the trust is satisfied, the legal estate will vest, under the will, in the person beneficially entitled to it. Doe dem. *Player vs. Nichols*, 1 B. & C., 336; *Doe vs. Simpson*, 5 East, 162; *Doe vs. Timins*, 1 Barn. & A., 530; *Doe vs. Ellis*, 4 Adolph & Ellis, 582; *Doe vs. Needs*, 2 Mees. & Wels. 129.

And so, Mr. Kent says, the better opinion is, that if there be a devise to trustees and their heirs, during the minority, of a beneficial devisee, and then to him, or upon trust, to convey to him, it conveys a vested remainder in fee, and takes effect, in possession, when the devisee attains twenty-one. And the reason is, that a trust estate is not to continue beyond the period required for the purposes of the trust. *Vid.* 4 Kent, 204, margin.

If the limitation of the trust estate, in the present case, were contained in a *will*, instead of a *deed*, its construction would be evident and certain. In that case, the manifest intention would govern and limit the estate of the trustee, to the continuance of the estate of the tenant for life, for whose protection it was created; and then, the legal estate in remainder, would vest in possession, under the will, in the children to whom it is limited.

The duties of the trustee, prescribed in the deed, have exclusive reference to the protection of the interest of the *feme covert*, for her sole and separate use, during her life. At the termination of the estate, his duties are to cease; for, the slaves are then to be equally divided amongst the remainder-men; that is, they take the slaves, then, in absolute property. Such is the evident intention of the deed.

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But it must be conceded, that the rule of construction, in this respect, is far more flexible, in the case of a will, than in case of a deed. In a will, the intention rules the construction, and it is stronger than the technical terms employed. In a deed, more effect is given to its technical and literal terms. Such is the general doctrine on this subject. Hill on Trustees, 239-248.

It is true, that in *Curtis vs. Price*, 12 Ves., 100, a limitation *in fee*, to trustees, contained in a *deed* was restrained by *implication*, to a smaller estate; it appearing to be the intention of the instrument, and that its purpose would be defeated by giving the limitation its full effect; as where a subsequent estate, for life, or years, is given to the same trustees, after the limitation to them in fee.

It must, however, be conceded, that an express limitation of an estate in fee, contained in a *deed*, will not be cut down into a less estate, merely because a fee in the trustees is not necessary for the purposes of the *deed*. *Wykham vs. Wykham*, 18 Ves., 423; Hill on Trustees, 251.

But, if a limitation to trustees *and their heirs*, be restrained to the life of the tenant for life, the estate of the trustees is thereby cut down to the duration of the life estate. The estate, in such case, is merely a freehold, and not a fee. It has, however, a transmissible quality. 4 Kent, 4.

The same principles apply, in this respect, to the limitations of real estate, and personal estate; though the terms employed be different, and far more simple in the one case than in the other. The words *heir* and *fee*, though used for illustration, have not, of course, any application to personal estate. A mere gift of a chattel by A. to B., not naming the quantity of estate, will pass

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the entire interest in the chattel, if that appear to be the intention, and no words of special limitation are necessary; and if used as in the case of real estate, they are to be taken as mere surplusage.

We apprehend, therefore, that where the subject of the trust is personal estate, the deed may receive a more free and liberal construction, conformable to the true and actual intention of the instrument, than is admissible where it is real estate, limited in the technical and artificial language appropriate to that kind of property. We may look more to the actual intention in the one case than in the other; and are less trammelled by arbitrary rules of law applicable to special words and modes of limitation.

Now, in view of these principles, what is the true construction of the present deed? We have seen that the intention is, that the trustee shall be invested with the legal estate and have the control and management of the property for the separate use of the wife during her life; and then, that his interest and functions shall cease and the estate be vested in absolute property and possession in the children, who take in remainder.

In a will, this intention would, of course, take effect; but is it so expressed as that it may take effect in a *deed*, in which, by the rules of law, a more strict construction is required?

We are of opinion that it is. We have seen that the technical terms applicable to real property, have no special meaning as here applied. The case is a gift to a trustee for the separate use of the wife for life; then to her children. The deed does not limit the estate to the trustee to hold for the *use* of the wife for life, then for the *use* of the children. If it were so limited, the legal

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estate would continue in the trustee, after the death of the wife, in trust for the benefit of the children, in accordance with the terms and intention of the instrument. On the contrary, *no use or trust* is declared for the children; if they take at all, they must take the legal as well as the equitable title. And such is the intention of the limitation; the slaves are to be equally divided amongst them; that is, having reference to the context, the slaves are given to them, to be equally divided and held in absolute property.

The gift is a vested remainder, to take effect in possession, at the death of tenant for life. How can it be otherwise, when no estate is given to the trustee for the use of the children, in remainder, but only for the tenant for life?

Now, the gift to the trustee is limited and restrained, as we think, to the life estate of the tenant for life, for whose use it is expressly held; and it can continue no longer; for, by the terms of the deed, the gift in remainder must then take effect; and we have seen that it is not a gift of the use, for no use is limited in remainder. It must, therefore, be of the absolute right, legal and equitable. If this be so, the legal estate of the trustee cannot continue at the same time, in the same property; but it is restrained to the life estate, by the gift in remainder, of the absolute estate, legal and equitable. It is the same in effect as if the limitation were of real estate, to trustees and their heirs, during the life of A; remainder to B; in which case, the estate of the trustees is cut down to a transmissible life estate.

We are of opinion, therefore, that, under a proper construction of the deed in question, the estate of the

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children was a vested, legal remainder, and that it took effect in possession at the death of the tenant for life; that is, about two years before the institution of the present suit.

We have seen, however, that a different rule of construction would apply, if the estate had been given or limited to the trustee for the *use or benefit* of the children, in remainder. In that case, there would be no conflict in the limitations, and they both might well subsist and stand together; the legal estate being in the trustee, and the *use* or beneficial interest being in the children. The use would not be executed and converted into a legal estate by the statute 27 Henry, 8; for, if the statute were in force here, it could have no application to a chattel interest, such as this is; 4 Kent., 302, margin.

Now, as to *Otey vs. Williams*, 8 Humph., 563, and *Stephens vs. Bomar*, 9 Humph., 546, relied upon by defendant's counsel, as establishing a different rule of construction, we may observe that the question considered in the present case, was not made or considered in either of those cases; and the words of limitation are not stated by the Reporter.

In *Williams vs. Otey*, the conveyance was of slaves in trust; first, for the payment of debts; second, for other uses stated in the deed; and it appears "that a portion of the debts secured by the deed were left unpaid." There was no express power to sell the slaves for payment of debts, but it was held that the power to sell and convey was necessarily implied, to give effect to the purposes of the trust. And so, it must likewise follow that the legal estate given to the trustees, must continue in them, for the same purpose; and it being

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barred by the statute, the trust estate was also barred.

In *Stephens vs. Bomar*, the legal estate was vested in Rebecca Ann Richardson for the use of her mother for life, and at her death to go to said Rebecca Ann and such other children as her mother might have. The mother, tenant for life, died March 1, 1832; said Rebecca Ann became of age, May 9, 1832; the adverse possession of the defendant commenced December 12, 1827, and the suit was not brought until May 16, 1846. The court was of opinion, that the trustee, though an infant, might have sued when the adverse possession commenced, in 1827; that the statute then commenced running against her; that, although by the death of the tenant for life, in 1832, the separate right of the trustee became merged in the right of all the children in remainder, yet, their disability could not be added to the disability of her infancy, previously existing; but the statute having begun to run, formed the bar, she not having sued in three years after her full age.

In the case now before us, the question does not relate to the bar of the statute, but to the true construction of the deed and the nature and extent of the rights existing under it. Now, the court say, in *Stephens vs. Bomar*, that the separate right of the trustee became merged in the right of all the children in remainder, the said trustee being one of them. The trust estate must therefore have ended with the life estate, and the persons entitled in remainder became invested with the legal estate under the deed. In this, there is nothing inconsistent with our judgment in the present case; on the contrary, it fortifies and maintains it.

The result is, that the plaintiffs are entitled to maintain the present action; and have not lost their rights

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by the negligence of a supposed trustee, who took no interest to protect them.

Let the judgment be reversed and remand the cause for a *new trial*.

Judgment reversed.

WYATT, a slave, vs. THE STATE.

RAPE. *Can only be perpetrated by force.* The offense of rape can only be perpetrated by the use of force, in overcoming the female. If the carnal knowledge of a woman be the result of a fraudulent stratagem, whereby the female is induced to yield her consent, the act is not rape.

The prisoner was convicted at the February Term, 1852, of the circuit court of Dickson county, PEPPER, Judge, presiding; and sentence of death pronounced upon him, whereupon he appealed in error.

N. H. ALLEN and HOUSTON, for the prisoner.

ATTORNEY GENERAL, for the State, said: Although I have been unable to find, in any of the books, the reason of the distinction which is made between the perpetration of the offence of rape, when committed by force, and the same *moral* offense, when committed by fraudulent deception of the female; yet, the cases in which the question has been made, are all against the statement of the circuit judge, in this instance. 1 Russel Cr., 677; Roscoe Cr. Ev., 798; Jackson's case. Russ

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& Ry., 487; Field's case, 4 Leigh, 648; Saunders' case, Eng. Com. L. Rep., 34, p. 383; and Williams' case, *Ib.* p. 392. In Roscoe Ev., p. 798, n. 1, it is said: "It seems that it is as much a rape, when effected thus, by stratagem, as by force." To support this, reference is made to 1 Wheeler's Criminal Cases, 378, 381, n.; and also, to Fields' case, in 4 Leigh, (above cited.) The latter case is at variance with the note in Roscoe.

CARUTHERS, J., delivered the opinion of the court.

This is an indictment for burglary, in the circuit court of Dickson county. The first count charges an intent to commit larceny; the second, to commit a rape upon the body of Mrs. Catherine Francis Evans, a free white woman; and the third, an assault with intent to commit a rape upon Mrs. Evans.

It was proved that the prisoner forced the door of the dwelling house of the prosecutor, in which he and his wife were sleeping, about 11 or 12 o'clock, at night; that he approached the bed in which they were sleeping, and put his hand upon her, which aroused her from sleep, and she gave the alarm, when the prisoner fled; the prosecutor pursuing him with his dogs and gun, until he overtook, shot, and disabled him.

The error alleged, and relied upon for a new trial, is, in that part of the judge's charge to the jury, which is in these words: "If the jury believe that the defendant attempted, either by force, or by fraudulently inducing the prosecutor's wife, to believe that it was her husband, and thereby to have carnal knowledge of her, that then they ought to find him guilty."

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The jury find a general verdict of guilty. They make no reference in their verdict to the separate counts; nor are they informed in the charge that they would have a right to find separately, and differently on the several counts. We cannot know, therefore, whether they would have found a verdict of guilty, or not guilty, on the first count. If that had been the verdict, it would not have been material, whether the above charge on the other counts, was correct or not. We cannot, therefore, know, but that the general conviction was based on the second or third counts. If that were so, it becomes vitally material to decide whether the law is correctly laid down in the part of the charge above extracted. We agree with the Attorney General, that the moral turpitude of the crime would be as great, when perpetrated by fraud and deception, as by force. If we had the power to make the law on that subject, we would not hesitate to have it as charged by his honor, the circuit judge; and we doubt not, but that the legislature will so enact, whenever the case is brought to their attention. In the black catalogue of crimes, there is none which so shocks all men as the one under consideration; none should be more severely punished. But, we cannot permit even a slave to be punished, without the full benefit of the law, as it is, either under the influence of popular feeling, or our own abhorrence at his acts. The question with us, should ever be, not what the offence deserves, nor what our feelings and individual opinions would dictate, but "what sayeth the law."

We need not now go back into the books of the common law for a definition of felonies; they are given in our penitentiary code, act of 1829, ch. 23. It declares, § 19.

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that "burglary is the breaking and entering into a mansion house by night, with intent to commit a felony." § 13: "Rape is the unlawful carnal knowledge of a woman, forcibly, and against her will." § 53: "Any assault and battery upon any female, with intent forcibly, and against her will, to have unlawful carnal knowledge of such female," is a felony. By the act of 1819, ch. 35, § 1: "Murder, arson, burglary, rape, and robbery, shall, when committed by a slave, be deemed capital offences, and be punished with death; provided, that the punishment in no case, shall extend to life or limb, except in the cases above enumerated." Car. & Nich. 679. By the act of 1835, ch. 19, § 10, it is enacted, "that any slave, who shall commit an assault or battery upon any free white person, with an intent to commit murder in the first degree; or a rape upon a free white woman, shall, on conviction, be punished with death by hanging." Car. & Nich., 683. The act of 1833, ch. 75, is to the same effect, except that it applies to free negroes, as well as slaves; but seems to require, in addition to the assault, that some violence to the person must be committed, to constitute the offence."

An assault, then, with intent to commit a rape, is a capital felony in a slave. But what is the offence that he must intend to commit? It is rape; and the law defines that crime to be the *forcible carnal* knowledge of a female. To break into, and enter a mansion house by night, "with intent to commit a felony," is burglary, which is a capital offence in a slave. The intent to commit a rape, or to make an assault with that intent, is a capital felony in a slave. But the intent is as essential as the act, to constitute that felony; and to make out that felony, the intent must be, to have the unlawful

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carnal knowledge of the woman, "*forcibly*, and against her will." But the law is laid down differently in the charge, in this case. Actual force is excluded, as an essential element of the crime. His honor declares the law to be, that if his intent was, to accomplish his object by fraudulently inducing the lady to believe he was her husband, and in that way attempted to have carnal knowledge of her, the offence would be complete.

The idea of force, as one ingredient of the offence, according to all the definitions in our acts, and in all the criminal authorities, is entirely discarded in the instruction to the jury, and was well calculated to mislead them. We do not pretend to give, or enunciate any opinion, on the sufficiency, or insufficiency of the proof in this case, to produce a conviction upon a correct charge of the law, upon all, or any one of the counts in this indictment. That will be determined by another jury, under a charge of the law as here expounded and settled. If he has forfeited his life, let it be legally taken, and the law will be thereby honored, and public justice sustained.

To these conclusions, we are brought by an exposition of our own acts of assembly. But we find the same principles laid down in the decided cases, and the works on criminal law, to which we will only refer; 1 Russell on Crim's, 677; Roscoe Cr. Ev., 798; Saunders' case, Eng. Com. Law Rep., vol. 34, p. 383; and Williams' case, same, 392; Fields' case, 4 Leigh, 648; 3 Chitty Cr. Law, 810. In most of these cases, the precise point of this case came up, and was decided, as we now decide the question. The current of authority is almost, if not entirely unbroken, on the subject. There is no respectable conflicting authority known to us. *Fraud* and strat-

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agem, then, cannot be substituted for *force*, as an element of this offence, according to the existing law.

We are, then, constrained, for this error in the charge, to reverse the judgment, and remand the defendant for a new trial.

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CRIMINAL LAW. *Special verdict.* A special verdict must positively state the facts themselves, and the court cannot supply a defect in the statement made by the jury upon the record, by any intendment or implication whatever; and this is so, although the circumstances stated may be sufficient to warrant an inference or presumption of the existence of the matter omitted.

SAME. *Same. Tempting a slave to leave his owner.* The offense defined in the Act of 1835, ch. 58, § 1, consists in the tempting or persuading a slave to leave his master's service, with the *intent* or *design* to convey the slave out of the State, or to deprive the true owner thereof. This intent or design is the chief ingredient of the offense; and hence, if the jury, in a special verdict, rendered in a prosecution for this offense, omit to state the fact that the acts of the prisoner (though they be sufficient to furnish ample *prima facie* evidence of the intent) were with this intent or design, no judgment can be rendered upon the verdict.

SAME. *Same. Quære:* Will a special verdict in a criminal prosecution, which is so imperfect as that no judgment can be rendered upon it, be a bar to another prosecution for the same offense?

The judgment, from which the prisoner appealed in error, was rendered, upon the special verdict quoted in the opinion, at the May Term, 1852, of the circuit court for Maury county, MARTIN, Judge, presiding.

M. S. FRIERSON, for the prisoner, argued: Suppose the court should be of opinion that the defendant did *tempt* and *persuade* the slave to leave the service of his own-

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ers, still the *verdict* does not find that he did it with the *intent* or *design* of depriving the true owner thereof; and notwithstanding the court might infer this from the evidence found by the *verdict*, yet it being an *essential ingredient* in this offense, unless *expressly* found to exist by the jury, the court cannot supply it by *inference* or *intendment*; the *implication* of law being that no such *purpose* or *design* did exist, and the merely finding evidence from which the jury might have, with propriety, inferred *intention* or *design*, is not sufficient to sustain the conviction; 7 Yerg. R., 510, 515; 8 Cow. R., 406, 414; 2 Modern, 245; 12 Modern, 628; 11 Wheaton; 6 Con. U. S. R., 369; 7 Ire. R., 228.

ATTORNEY GENERAL, for the State, argued: The statute makes the offence to consist in the "intent or design" to deprive the owner of his slave. The verdict states that the prisoner, having been apprised of the determination formed by the slave to leave his owner, "*undertook to aid him* (the said slave) *in procuring free papers,*" but is wholly silent as to the "intent or design" with which this aid was proffered to the slave.

It is not necessary that the jury, in rendering a special verdict, should find the intent. If they find a certain state of facts to exist, from which the intent can be *legally* inferred as a conclusion of law, it is sufficient to authorize judgment.

Although the legislature has used the language employed in this statute, I take it that the *intent* is not a more important element in this, than it is in every other offense. If a party clandestinely take the personal goods of another, without his consent, and convert them to his own use, the law infers an intention on his part to steal.

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If one person slay another with a deadly weapon, the law will imply an intention to commit murder. So in many other cases, some of which are enumerated in 1 Russ. Cr., 48. The *intent* of one doing an unlawful act—the *quo animo*—*cannot be known*; it is within the breast of the party, and can only be inferred from his language or his conduct. The law, in the cases referred to, and indeed, in all cases, whether they be civil or criminal, will imply the purpose, motive or intent with which an act is done, from the manner in which it is done, and the circumstances surrounding it. This conclusion is *a conclusion of law*, and not of fact; and in a criminal case where the jury find the facts, and devolve upon the judge the duty of determining the legal conclusion from the facts, he must do so; Short's case, 7 Yerg.

Is the "intent or design," in the offense with which the prisoner is charged, such an element of the offense as constitutes it *a fact*, to be proved as other facts; or is it but the same ingredient that exists in every other offense, and the existence of which is to be inferred from a given state of facts? If it be the latter, then the question arises, do the facts found by the jury exclude every other conclusion than that the design of the prisoner was to deprive the owners of their slave?

McKINNEY, J., delivered the opinion of the court.

The plaintiff in error was indicted in the circuit court of Maury, under the Act of 1835, ch. 58, § 1. That section provides, that "If any person or persons, whatsoever, shall directly or indirectly tempt or persuade any slave or slaves to leave his, her, or their master, or mistress' service, with an intent or design to convey him,

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her or them out of this State; or with intent or design to deprive the true owner thereof; or shall harbor or conceal such slave or slaves for that intent or purpose, such person or persons shall, upon conviction thereof before any tribunal in this State having jurisdiction thereof, be adjudged guilty of felony; and shall, for every such offense, be confined in the public jail and penitentiary for a term not less than three, nor more than ten years."

At the May Term, 1852, the jury found a special verdict in the following words: "We find that Jesse, the boy mentioned in the indictment, is a slave, the property of the Duck river Slack Water Navigation Company; that said slave, Jesse, formed the determination to run away, and escape permanently from his owners; that this determination on the part of the slave, Jesse, was formed without his being persuaded or enticed thereto by the defendant. The jury further find, that Jesse, the slave, communicated this determination to the defendant; and, thereupon, the defendant undertook to aid the said slave, Jesse, in procuring free papers, and applied to a white man for the purpose; when the plot was detected. All these facts took place in Maury county," &c. The jury submitted the question of law to the court, and fixed the period of confinement in the penitentiary at three years, should the court be of opinion that, upon the foregoing facts, the defendant was guilty of the offense charged in the indictment.

The court adjudged that the defendant was guilty, and pronounced judgment accordingly; from which he prosecuted an appeal in error to this court.

The question for our determination is, are the facts stated in this verdict sufficient to constitute the offense

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created by the statute? It is laid down in Chitty's Criminal Law, (1 vol., 643,) that a special verdict must positively state the facts themselves, and not merely the evidence adduced to prove them; and all the circumstances constituting the offense, must be found, in order to enable the court to give judgment; for the court cannot supply a defect in the statement made by the jury on the record, by any intendment or implication whatsoever; see also, 2 East P. C., 708, 784.

And this is so, although the circumstances stated might be sufficient to warrant an inference or presumption of the existence of the matter omitted. The court can deduce no conclusion, by way of intendment or presumption, from the facts stated in the verdict, in order to supply the omission of a material fact not stated. And every matter essential to the judgment which the court is called upon to pronounce, not found by the jury in their verdict, must be taken not to exist. From these well established principles, it is clear that the judgment is wholly unsupported by the verdict.

The offense defined in the statute, consists in the tempting or persuading a slave to leave his master's service, with the *intent* or *design* to convey said slave out of this State; or to deprive the true owner thereof. It is the existence of such criminal "intent or design," that constitutes the act of tempting or persuading, an offense. It is the chief ingredient of the offense, and must be averred and proved in order to support a conviction under the statute.

In this verdict, there is no finding of the fact of such an intent or design. This was a singular omission on the part of the jury, as the acts of the defendant, as stated in the verdict, furnish at least ample

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prima facie evidence of the criminal intent made necessary by the statute to constitute the offense. But this fatal omission cannot be supplied by the court. The result is, that the judgment rendered in the verdict must be set aside as wholly unwarranted. But, in doing this, the question remains to be considered, what judgment ought to be given here? Whether a judgment of discharge, or whether a judgment setting aside the verdict as a nullity, and remanding the defendant for another trial. It appears, in the practice of the English courts, that where a special verdict in a criminal case is so imperfect that no judgment can be given on it, but, still, from the facts found therein, it sufficiently appears that the defendant has been guilty of the crime charged, the court may, in *misdemeanors*, award a *venire facias de novo*. But it seems doubtful whether this can, or ought to be done in *felonies* of the high grade. And it is said that a judgment of discharge, by reason of an imperfect special verdict, will be no bar to another prosecution for the same felony; 1 Chitty's Cr., § 646; Com. Dig. Indict. N.

This question was not noticed in the discussion of the case at the bar, and, therefore, we will not at present commit ourselves upon it. In the present case, we simply hold that no judgment can be given against the prisoner, on the special verdict; and, consequently, the judgment of the circuit court will be reversed, and the prisoner be discharged from *this* prosecution, leaving open for future adjudication, if necessary, the question, whether or not this judgment will constitute a bar to another prosecution for the same identical offense.

Judgment reversed.

WYNNE'S *lessee et als.* vs. WYNNE.

DEVISE. *After-acquired lands.* *Act of 1842, ch. 169, § 4.* The act of 1842, ch. 169, § 4, applies as well to wills made before the passage of the act, if the testator were living at the time of its passage, as to wills to be made afterwards.

CONSTITUTIONAL LAWS. *Retrospective laws.* The act of 1842, ch. 169, § 4, though it be construed as applicable to wills made before its passage (the testator being alive at the time of its passage) is not in conflict with the declaration of rights, Art. I, § 20.

CONSTRUCTION OF WRITINGS. *Will.* *Act of 1842, ch. 169, § 4.* The testator made the following devise, "I give to my much beloved wife, Martha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others." *Held* that it was clearly the intention of the testator that all real property held by him at his death, whether acquired before or after the date of his will, should pass to his wife, and that under the act of 1842, ch. 169, § 4, lands acquired after the date of the will did so pass.

This was an action of ejectment commenced in the circuit court of Davidson county. At the September Term, 1851, MANEY, Judge, presiding, there was judgment for the defendant, and the plaintiffs appealed in error.

MEIGS and STOKES, for plaintiffs in error.

TRIMBLE, F. B. FOGG, CARUTHERS and E. H. EWING, for defendant in error.

HOUSTON, Special J., delivered the opinion of the court.

This is an action of ejectment for two pieces of land in Davidson county, near the city of Nashville. The lessors of the plaintiff claim the land as the heirs at law of Albert H. Wynne, deceased, being his nephews and neices; and the defendant, his widow, claims the land as devisee under his will. The will bears date the 3d of October, 1830, and the testator died in June, 1849.

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After his death, the will was found among his valuable papers, all in his own handwriting, signed by him, but unattested by witnesses. He had been married to his wife many years and had no children. At the date of the will, he had a large personal estate and but little real estate. He purchased the property in controversy after the year 1830, together with a large property real in Mississippi. The property sued for, is the late residence of the testator and a lot adjoining it or near to it, and is worth eight or ten thousand dollars. The will is in few words and after providing for the payment of his debts by the first clause, he declares, "Item 2d. I give to my much beloved wife, Micha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others." He then appoints his wife sole executrix, unless she should wish some other person to join her, expressing a wish that no security be required of her, unless some other person should join her.

Several questions have been raised in the argument and elaborately discussed, but from the view we have taken of the case, we deem it unnecessary to notice all the questions raised. The first section of the act of 1842, ch. 169, prescribes the mode of descent, where any person shall die intestate, and having no issue or brothers or sisters, or issue of brothers or sisters. The second section provides that when an estate is vested by descent, it shall not be divested by the birth of a child; unless such child shall be born within ten calendar months next after the death of the intestate.

The third section provides, that when any person to whom any estate shall be devised, shall die before the death of the testator, leaving issue living at the testa-

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tor's death, such devise shall not lapse, but shall vest in the issue of the deceased devisee.

The fourth section of the act is in these words, "That any estate, right or interest in lands acquired by a testator, after making of his will, and of which he died seized or possessed as aforesaid, shall pass thereby in like manner as if owned by him at the making of the will, if such clearly appear by the will to have been the testator's intention."

The first question raised is, doth this fourth section apply to wills made before its passage, when the testator lived until after its passage? In other words, does it apply to the will of Albert H. Wynne? It is well known, that before the passage of this act, land acquired after the making of a will, did not pass thereby in this State, however clear the intention of the testator might be, that it should so pass. The reason of this rule was, that a devise is in the nature of a conveyance or an appointment of a particular estate; and therefore lands purchased after the execution of the will, did not pass by it; 4 Kent, 510.

This was a stern and inflexible rule, in many cases operating hardly, by wholly defeating the clear and unequivocally expressed wish of the testator; and the object of the statute was to abolish this harsh rule and to permit testators to pass all their real estate by will, as well future acquisitions, as lands then owned, if such appeared to be the intention, placing the devise of real estate on a footing, as high as might be, with a will of personalty, to pass according to the apparent intent of the testator.

There is nothing in the language of the act, restricting its operation to wills made after its passage. On

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the contrary, the terms of the act are general, and broad enough, it seems to us, to apply to all estates in lands, acquired as well after, as before the execution of the will. "Any estate, right, or interest in lands acquired by a testator, after making of his will, and of which he died, siezed, or possessed, as aforesaid, shall pass thereby," &c. This is comprehensive without a restriction, or seeming restriction, as to the date of the will. And the fifth section of the act, would seem to strengthen this view of the question. It provides, "that nothing herein contained shall be so construed as to operate upon, or affect in any manner, or apply to the estate of any person or persons whatsoever, who have died previous to the passage of this act." By excluding, in such express terms, from the operation of the act, the estate of persons who have died before its passage, the section very strongly indicates the intention of the legislature, to include, in the fourth section, the estates of all persons who are living at the date of the passage of the act; and we are of opinion, that such was the intention of the legislature, and that the fourth section does apply to Albert H. Wynne's will, and to the property in controversy. And we are the better satisfied with this view of the question, by the fact, that this act has received the same construction by the courts of Massachusetts. The fourth section of our act is identical with the act of Massachusetts upon the same subject, excepting the word, "manifestly," which appears in the Massachusetts act and not in ours. That act has been construed by the supreme judicial court of Massachusetts, to apply to wills made before its passage, as well as to wills made afterwards; *Cushing et als. vs. Aylwin*, 12 Met., 169; *Pray vs. Waterston*, 12 Met., 262.

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It is true, that the act of North Carolina, upon this subject, has received a different construction by the supreme court of that State. But it does not appear, that the act of North Carolina contains any such provision as that contained in the fifth section of our act. And moreover, the terms of the North Carolina act, as the court there says, clearly make it operate prospectively, only. They are, "that it *shall* be lawful for any testator," &c.; and "that the *power hereby given shall extend*," &c.; *Battle vs. Speight*, 9 Ire., 288.

2. But it is further insisted, that if the act of 1842, ch. 169, § 4, in terms, applies to wills made before its passage, and the legislature intended that it should so operate, it is inoperative and void, because in direct conflict with our Declaration of Rights, article 1, § 20; which declares, "that no retrospective law, or law impairing the obligation of contracts, shall be made." If this is true, then, of course, there is an end of the question, so far as the act of 1842 is concerned. It is true, that taking the provision in its literal terms, the act of 1842, and all other legislation having in view past transactions of whatever nature or character, would be in conflict with it. But taking it in its limited and restricted signification, as defined by our courts of justice, and there are many cases of retrospective legislation that are not prohibited. But is the act of 1842 one of the cases not prohibited by it? This section of the Bill of Rights has been so often directly and indirectly before the courts, and has received such a uniform legal construction, that we do not feel authorized, were we so inclined, to depart from it.

We understand that construction to be, that retrospective laws may be made where they do not impair the

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obligation of contracts, or divest or impair vested rights. And hence, the legislature may make laws for the extension or mitigation of offences, for repealing former laws; for the enforcement of contracts already made; or to make a paper authenticated according to its directions, evidence, though not evidence before; laws affecting the authentication and solemnities of contracts; laws giving further time for the registration of deeds; laws validating deeds, and the defective probate of deeds; laws providing for the payment of the officers and agents of the State for services already performed; laws providing new and additional remedies for a just right already in being; laws modifying or changing remedies, and all other strictly remedial laws; and there are many other laws that are retrospective, according to the letter, yet not prohibited by the Bill of Rights; 1 Meigs' Dig., 305-6.

In the case of *Townsend vs. Townsend*, Peck. R., 121, speaking of the 20th section of the bill of rights, the court says "that the whole clause and both sentences taken together, mean that no retrospective law which impairs the obligation of contracts, or any other law which impairs their obligation, shall be made."

In many other cases, a retrospective law is defined to be a law infringing or divesting vested rights. A retrospective statute, affecting or changing vested rights, is generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void. But this doctrine is not understood to apply to remedial statutes, which may be of a retrospective nature, provided they do not impair contracts or disturb absolute vested rights, and only go to confirm rights already existing and in furtherance of the remedy, by curing defects

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and adding to the means of enforcing existing obligations; 1 Kent., 455.

We are satisfied with the principle above stated; for there are necessarily cases, almost without number, constantly arising under our system of government, that require the passage of laws in reference to past transactions; not for the purpose of infringing rights, but to protect them from loss or injury; and we are not aware of any case in which it has been held that a retrospective law, simply because retrospective in terms, is unconstitutional and void; they have been so held, as connected with rights and obligations, where they affect or change vested rights, or impair the obligation of contracts.

It is true, that it has been said, by high authority, that retrospective laws are generally unjust, and neither accord with sound legislation nor the fundamental principles of the social compact; Story on the Const., § 1392. But this cannot, justly, be predicated of such retrospective laws as are sanctioned by our courts. It may be said, that to open the door to the passage of any retrospective laws, is to open it to the passage of all such laws, and to an abuse of legislation on the subject; but this may be said of all legislation on any subject. Our courts are the judges of the powers of the legislature, and are open to correct the abuses of these powers, and to guard against unconstitutional legislation; and as we must necessarily have retrospective laws, and as many such are wise and proper, it is for the courts to judge, whether rights are divested, or contracts impaired by them, and so to declare the law.

Now, with this understanding of the meaning of the bill of rights, as above stated, what is the character of the act of 1842, ch. 169, § 4? It cannot be denied, that

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it materially changes the character and effect of the will in question, from what it would have had, if the statute had not been passed.

Its construction is different from what it would otherwise have been. It could not have passed after-acquired real estate, but now it may. It could not have been available, in the hands of defendant, as evidence of her title to the property in controversy; but now it may be. But this is all that can be said of the act of 1842; and is this sufficient? If this difference of character and effect, produced a like difference or change of vested rights under it and by virtue of it; then, we would say that it comes within the prohibition, and would be inoperative. But is this so? Is any contract impaired, or right infringed or divested? It seems to us, most clearly, that such is not its effect. The law merely acts upon a paper which does not arise in contract, or vest rights or create obligations. It creates or establishes a new rule of law as to the paper and its subject matter, to the injury of no person whatever. Although as to form, the will was perfect in October, 1830, still it is ambulatory until the death of the testator; it is to be his will at his death, or not, as he may see proper to determine. It vests no rights. It imposes no obligation. It is, virtually, a blank, until the death of the testator. It does not abridge his rights, but rather enlarges them. It enables him to do, what before, he could not do, however strong may have been his wish or intention, and however clear it might have appeared on the face of his will. We think the control of the whole subject of wills, and the transmission of property by will, is under the control of the legislature; and if the act had said that no estate, right, or interest in lands, shall hereafter pass

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by will, would any of the land of Albert H. Wynne have passed to the defendant, by virtue of his will? We cannot conceive upon what principle it would have so done, under our decision on the subject of retrospective laws; and the principle is the same in the case supposed, and in this case; and we think that the act of 1842, ch. 169, § 4, is not in conflict with the 20th section of the bill of rights.

3. But it is insisted that if the act of 1842 applies to this case, and is not inoperative and void, it does not clearly appear by the will to have been the testator's intention that his after-acquired real estate should pass thereby.

The testator says, "I give to my much beloved wife, Micha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others." Now, does it appear by this will, that he intended to give to his wife his after-acquired real estate? It is not necessary that he should have made an express declaration in so many words, that he so intended. It is sufficient, if, taking the whole will together, such intention clearly or satisfactorily appears. There is a clear intention on the part of the testator, not to die intestate as to any of his property, and an equally clear intent that his wife should have all his estate; and not satisfied with an express declaration to this effect, and to make his intention, if possible, more manifest, he adds, that she is to have it "to the exclusion of all others," and we think that his intention to give his future as well as his present estate, reasonably and satisfactorily appears by the will. He could not have well used stronger language, showing this intent, unless he had declared, in express terms, that all

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his estate owned at his death, should go to his wife. And we are strengthened in our conclusion, by the fact that it has been frequently so held by the supreme court of Massachusetts, upon similar words in a will, under their statute; *Cushing* vs. *Aylwin*, 12 Met., 169; *Pray* vs. *Waterson*, 12 Met., 262; *Fay* vs. *Fay*, 1 Cush., 93; *Winchester* vs. *Foster*, 3 Cush., 366.

In 1 Jarman on Wills, page 285, it is laid down that, under the old law, where a testator made a general gift of his real and personal estate, he was considered as meaning to dispose of these respective portions of his property to the full extent of his capacity; and accordingly such a gift, in regard to real estate, was read as a gift of the property belonging to the testator at the time of the execution of his will, (he being incapable of devising any other,) and as to personalty, as a disposition of what he might happen to possess at the period of his decease.

Thus, we see the reason why a general bequest of personalty was considered as a bequest of all the property of that kind, of which the testator might die possessed. It was so held, because, by such general gift, it was considered that such was the intention, upon the face of the will; and there being no want of power, such intention would be carried out. He was considered as *intending* to dispose of such property to the full extent of his power. And so, a general devise of real estate, indicated the same intention; but not having power to devise after-acquired real estate, by a general devise, it would not pass by such clause for that reason, and not because the intention so to devise did not appear by the will. The intention in each case, manifested by a general gift, was the same, and it could be carried out

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in one case, and in the other it could not. But now the statute comes and gives the testator power to devise after-acquired realty; and his intention, as manifested by a general gift, will be carried out.

From the view we have taken of the act of 1842, it will not be necessary to decide the questions, as to whether publication and re-publication apply as to holographic wills; or, if they do, whether there can be parol re-publication of such will; and if so, whether there was such re-publication in this case. And as the charge of the circuit judge does not materially vary from the view we have taken of the case, we affirm the judgment of the court below.

RAGSDALE *vs.* THE STATE.

SUMMARY PROCEEDING. *A motion of clerk of the circuit court. Judgment.* The proceeding, under the statutes, against a clerk for failing to produce the proper receipts for the county and state revenue, by him collected as clerk, is summary in its character, and hence the judgment in such case, must assume, in itself, the existence of a state of facts which render it legal and proper, in view of the statutes, to remove the clerk from office.

SAME. *Same. Same.* The facts which must appear in the judgment, removing a clerk for failing to produce his revenue receipts, are, that he was clerk of the court during the year or the term for which it is alleged he was in default; that it was moved before the court that he produce his receipts as directed by the statutes, and that he failed to do so.

SAME. *Same. Appeal.* An appeal, in the nature of a writ of error cannot be taken from the judgment of the circuit court, removing the clerk of that court for failing to produce his revenue receipts, as required by the statutes, as the proceeding in such case cannot be considered as a *suit* and *judgment*, in the sense of the statute giving the appeal in error.

SAME. *Same. Writ of error. Practice.* If the clerk of the circuit court be improperly removed from his office by the judgment of that court for an alleged failure to produce his revenue receipts, his remedy is, either by a *mandamus* to be restored to his office, or by writ of error, to have the proceeding revised and reversed.

This was a proceeding in the circuit court of Coffee county, as stated in the opinion. At the January Term, 1853, MARCHBANKS, Judge, presiding, the judgment was rendered, from which the defendant appealed in error.

HICKERSON, for plaintiff, argued, that the judgment did not sufficiently show, as it should, the grounds of the removal of the clerk, and proceeded: It may be said that the cause is improperly here; that an appeal does not lie to this court, in such case. This question was also made in Sevier's case, and there it is expressly decided by all the court, that a writ of error will lie: and it will not, of course, be contended that an appeal will not lie when a writ of error would. Since that decision, there has been no legislation restricting the right of appeal; but on the contrary, the tendency has

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been to enlarge and extend the right; to have cases tried in this court upon the merits. But, there can be no doubt of this right; it is, as above stated, expressly given by the act of 1801. Again, it is expressly declared by the act of 1811, that a party to any suit shall have the right of appeal; and surely this is a suit. This court has always entertained appeals in cases of motions against sheriffs, constables, &c.; and so far as I know, the right has not before been questioned. In fact, I know of no case in which a party has not the right to an appeal, except in the solitary case of contempt, and the reasons for this are most obvious, and are fully stated in Martin's case, 5 Yerger.

ATTORNEY GENERAL, for the State.

TOTTEN, J., delivered the opinion of the court.

This is a motion against the clerk of the circuit court of Coffee. At January Term, 1853, of said court, the attorney general moved the court that the clerk thereof produce his proper receipts for the county and State revenue by him collected, as clerk, during the revenue year that ended the first of September last. The court ordered the same to be produced, and the clerk failing to produce said receipts, or to account in any legal manner for their non-production, if indeed, there be any legal excuse in such case; the court thereon removed the said clerk from his office, and appointed William Blanton clerk, *pro tempore*, of said court, and duly inducted him into said office.

From the judgment and proceeding of the court in this behalf, removing the said Ragsdale, and appointing

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the said Blanton to take his office, the said Ragsdale prayed an appeal, in the nature of a writ of error, which was granted to him; he having entered into bond with sureties, payable to the State, with the usual conditions to prosecute the appeal. The court thereon ordered that the appointment of Blanton, as clerk of said court, be suspended, and that it abide such judgment as this court may give in the premises.

The counsel for the clerk insists that the judgment of reversal is erroneous, because it does not assume and state the facts necessary to a valid judgment in such case.

On the contrary, the Attorney General for the State contends that the judgment is valid; and, *second*, that the *appeal in error*, is not the proper mode of bringing the case in review before this court.

The action of the court, in a case like this, is authorised and made a peremptory duty by the acts of 1835, ch. 55, and 1842, ch. 147.

But as the proceeding is summary and highly penal in its nature, it is a well settled doctrine of the court, that the judgment must assume in itself, the existence of a state of facts, which render it legal and proper, in view of the statute, to remove the clerk from office. They are few and simple. It must appear that he was clerk of the court, during the year, or the term for which it is alleged that he is in default. Second, that it was moved before the court that he produce his revenue receipts, as directed by said statutes, and as was done in the present case, and failed to produce the same. From these premises, a judgment that the clerk has forfeited his office, and that he be removed therefrom, is a proper and legal conclusion. In the present case, it is not stated or assumed in the judgment, that

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said Ragsdale was clerk of said court for the revenue year ending the first of September last, that being the period for which he was required to produce his revenue receipts. For this omission the judgment is defective and erroneous. If he were the clerk during the period referred to or for a part thereof, he was not liable to produce the revenue receipts, which were demanded of him, and their non-production was no forfeiture of his office. If we could look out of the judgment, as we cannot, there is nothing in the record showing the date of his appointment. It is only said that he was absent in the south, and that a deputy was performing the duties of his office. This, however, is immaterial to the legal question before stated. The judgment in a summary proceeding, as this is, must be perfect in itself, and cannot be aided by extrinsic proof. The same doctrine was held in *Garner vs. Carroll*, 7 Yer. Rep., 366, which was a motion against a clerk.

In reference to the question of practice, we are of opinion that the appeal in the nature of a writ of error, will not lie in a case like this. The writ of error is the proper practice. The act of 1811, ch. 72, § 11, provides that "when either party in any suit, which may be depending in any of the circuit courts, shall be dissatisfied with the judgment of such court, or shall be of opinion that there is error in the record of the proceedings in such suit," he may pray an appeal in the nature of a writ of error, to the supreme court. In *Thomason vs. Kercheval*, 10 Humph. Rep., 324, it was held, that "the appeal in the nature of a writ of error, given by our acts of 1811, ch. 72, § 11, and 1813, ch. 78, § 2, is intended to operate as a writ of error and supersedeas, at common law would do.

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The appeal in error suspends the judgment of the circuit court, but does not abrogate that judgment, until a judgment be pronounced in the supreme court." This we consider a true exposition of the law on this subject.

But we think that the action and order of the court, removing its clerk for any legal cause, and appointing another in his stead, cannot be considered a *suit* and *judgment*, in the sense of the statute giving the appeal in error. It is more in the nature of a proceeding in contempt, from which no appeal will lie. The power of a court to remove its clerk for legal and sufficient cause, of which, in the first instance, it is to be the judge, is to be considered as absolute and peremptory. It is indispensable to the proper and efficient administration of the business of the court. If the court err, in the exercise of this inherent and necessary power, the clerk is not without remedy. He is entitled to a *mandamus* to be restored to his office, or to a writ of error, to cause the proceedings to be revised and reversed, if erroneous. The writ of error will lie at the common law, independent of the statute, to revise the proceeding; it being the final order and judgment of a court of record, proceeding according to the course of the common law. If the appeal in error were allowed, it would have the effect to suspend the judgment of removal, and continue the clerk in office, pending the appeal. He may have been removed as a public defaulter, or for other odious and flagrant cause that would render it still more inconvenient and prejudicial to the public interest, that he be continued in office; yet, if the appeal will lie, he may, at his own option, suspend the judgment, and continue in office until the appeal in error be determined, and the court be powerless to rid itself of the incumbrance. Such a

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practice cannot be tolerated, unless it were expressly declared by statute. The appeal in error will lie only where it is given by the statute; and we are satisfied, as before stated, that a case like this is not within either the letter or intendment of the statutes which give the appeal in error.

The order and judgment of the court, removing its clerk, are absolute and effectual. The office becomes thereby vacated, and it is competent for the courts to fill it by a *pro tempore* appointment, as directed by the statute.

It results, from this view of the case, that the appeal in error was improperly allowed, and that it confers upon this court no jurisdiction of the cause. It will therefore, as an appeal in error, be dismissed from the docket. But the party is entitled, as a matter of right, to his writ of error to reverse the erroneous judgment.

Let the appeal in error be dismissed.

WOODFOLK vs. NASHVILLE & CHATTANOOGA RAIL ROAD
COMPANY.

CONSTITUTIONAL LAW. *Compensation to owner of property which has been taken for a public use; how, and in what way to be made.* Where the legislature, in the exercise of the power conferred by the constitution, assumes to appropriate the property of a private individual to a public use, in the construction of a rail road, it cannot prescribe how much, and in what way, the owner shall be compensated for the property so appropriated. The value of the property taken, must be assessed by a just and proper tribunal, and the amount paid is money. It is a debt against those who take the property, and must be paid as all other debts. The owner thus deprived of his property, cannot be coerced to receive as compensation, ameliorations of his remaining property, or the enhancement of its value, or any other "benefit or advantage," either real or imaginary, that may be conferred upon him. The measure of the compensation to be made to the owner in such case, is the fair cash value of the property taken, at the place, and in the form taken; the incidental damages or benefits which are to result to him from whom the property is taken, from the use to which it is to be applied, form no element in the computation of the compensation. So far as such incidental benefits and damages are involved, the legislature may make such regulations as are deemed proper, in the way of placing one as a set-off against the other.

This was a proceeding in the circuit court of Davidson county, upon the facts and for the purpose stated in the opinion. At the January Term, 1852, TURNER, Judge, presiding, there was a judgment for the plaintiff, from which the defendants appealed in error, and from which the plaintiff himself prosecuted a writ of error.

MEIGS and EWING & COOPER, for plaintiff in error, argued: Increase in value of the adjacent property, is not the compensation meant by the Constitution. "Even for the general good of the whole community, no unnecessary violation of the rights of property is, in any instance, allowed by the English law. If a new road, for example, is to be made through the grounds of a private person, in a case where it would be exclusively beneficial to the public, the legislature never permits

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itself to do this without the consent of the owner of the land; or at least without securing to him a complete indemnification. In vain may it be urged that the good of the individual ought to yield to that of the community. The true principle applicable to all such cases, is, that the private interest of the individual is never to be sacrificed to a greater extent than is necessary to secure a public object of adequate importance. The public, therefore, is considered, in all such transactions, as an individual, treating with an individual for an exchange. All that the legislature does, is, to oblige the owner to alienate his possession for a reasonable price; and even this is an exertion of power which the legislature indulges with caution, and which nothing but the Legislature can perform;" 1 Stephens' Com., 154, 155; 1 Bl. Com., 139.

"The principle is, that the lands of individuals are holden subject to the requisitions of the public exigencies, a reasonable compensation being paid for the damages. It is not taking the property of one man and *giving* it to another. At most, it is a forced sale to satisfy the pressing want of the public. Now, this is as it should be. The will or caprice of an individual, would often defeat the most useful and extensive enterprises, if it were otherwise. Property is, nevertheless, sufficiently guarded by the constitution. The individual is protected in its enjoyment, saving only, when the public want it, not merely for ornamental, but for some necessary and useful purposes. Then, indeed, the individual must part with it for an equivalent;" *Boston & Roxbury Mill-dam Company vs. Newman*, 12 Pick., 480; 11 Peters, 642, 644, 645.

When these authorities say that private property is not to be taken for public use, without a "complete indem-

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nification," "reasonable price," "reasonable compensation," "an equivalent," do these phrases mean that the owner has the thing they signify, if his land *not* taken, is increased in value as much as the value of that which *is* taken? In *Bloodgood vs. The Mohawk & H. R. R. Company*, 18 Wendell, the New York Court of Errors say: "There can be no diversity of opinion, as to the meaning of the words, *just compensation*. It is a fair equivalent in money, a *quid pro quo*; it is a recompense in value, for the property taken; p. 35. The same doctrine is held in 2 Dallas, 315; and 9 Dana, 114. In these phrases, the judges have expressed the same idea which the phrase *just compensation*, in the constitution, is used to convey; and their opinion of what the constitution means, is not to be mistaken. See Const. of Vermont, ch. 1, § 2.

In the case of *Parham vs. Justices, &c., of Decatur county*, 9 Georgia R., 341, 351, the court state the grounds upon which private property may be taken for public use. as follows:

1. Private property may be taken for the public use, without compensation, in cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the legislature; as where houses are pulled down, and bulwarks raised for defense against an enemy. and the like. In these cases, there is no remedy but by petition to the legislature. And such is the doctrine of this court in *Barrow vs. Page*, 5 Hayw., 97, 100: Meigs' Dig., 531.

2. But this rule of necessity has very narrow limits: it is indeed an exception to the general rule, which is, that when public necessity requires the assumption of private property, it can only be done by the act of

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the legislature, and the legislature must make provision for compensation. If it does not, the courts may pronounce the law a nullity.

This, says the court, was the law of the land in England, before Magna Charta. Against the contrary, the Great Charter guarded, by declaring that no individual should be deprived of his property, but by the law of the land, and by judgment of his peers. The petition of rights affirmed the same doctrine; and this great rule of right and liberty was the law of the State of Georgia, at the adoption of the Constitution.

The writers on the law of nations hold the rule to be the same; the Code Napoleon, Art. 545; the Civil Code of Louisiana, Art. 489, as well as the 5th Art. of the Amendments to the Constitution of the United States, recognize this rule. Even the government of Turkey submits to its control; 9 Georgia R., 350-1.

The supreme court of South Carolina, in 1796, divided upon the question whether private property could be taken for a public highway without compensation. The majority held the affirmative, upon the idea, that the taxing power and this power of eminent domain, were analogous. The supreme court of Georgia shows the fallacy of this, by observing that each citizen is presumed to pay, and ought, in fact, only to pay, his equal proportion of taxes needful for the support of government. But if private property is taken to build a road, and no compensation is awarded, then the burthen of providing roads for the public, falls, with onerous inequality, upon those citizens over whose lands the road happens to run. They pay their proportion of the general taxes, and of those raised to defray the expenses of opening roads; and, in addition, they give up their lands for the right of way.

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There is no equality, no justice in this. A law which raises the taxes out of one man or class of men, the balance going free, would be contrary to natural right and justice, just as a law which would constrain one or a few to pay the expenses of a highway, would be; and both would be set aside as nullities; *Ibid*, 352.

But the distinction between the taking of private property by taxation and by right of eminent domain, is still more clearly and succinctly shown by the court of appeals of New York, in the case of *The People ex relatione Frederick Griffin et als. vs. The Mayor, &c., of Brooklyn*, pamphlet, pp. 1-37. "Taxation, says the court, exacts money or services from individuals as and for their respective shares of contribution to any public burthens. Private property, taken for public use by right of eminent domain, is taken, not as the owner's share of contribution to a public burthen, but as so much beyond his share. Special compensation is, therefore, to be made in the latter case, because the government is debtor for the property so taken; but not in the former, because the payment of taxes is a duty, and creates no obligation to re-pay otherwise than in the proper application of the tax. Taxation operates upon a community, or upon a class of persons in a community, and by some rule of appointment. The exercise of the right of eminent domain operates upon an individual, and without reference to the amount or value exacted from any other individual or class of individuals," p. 8.

In *Meacham vs. Fitchburg Railroad Company*, 4 Cush-
ing, 292, 299, the court holds that an advance in the value of the remaining portion of a lot or parcel of ground, a part of which is taken for the construction of a railroad, may be deducted from the damages sustained

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by the owner of the land; that the jury, however, are absolutely restricted, in making this deduction, to the land adjacent to that taken for the road, or connected as one tract or parcel of land therewith; that the deduction to be made is the "*peculiar benefit*" to the owner of the land, arising out of the location of the road; and that the great and leading principle, to authorize such reduction of damages, is the direct benefit or increase of value to the *remaining part* of the tract or parcel of land, by reason of the railroad's passing through the lot or tract as to which the damages are claimed. Finally, that the *time* at which this increase in the value is to be estimated, is the actual staking out of the road, that being the period when the land is taken; 298-9. To the same purpose is *James River & Kanawha Company vs. Turner*, 9 Leigh, 315, 331, 341.

F. B. FOGG and TRIMBLE, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

The defendants located their road for about five hundred feet, on a six acre lot of plaintiff, in the vicinity of Nashville. The road runs through the corner of the lot, separating about three-fourths of an acre from the main lot, and occupying in the bed, which is from seven to ten feet deep, about three-fourths of an acre. The plaintiff has his family residence on the lot, and it is handsomely and tastefully improved. The part separated, has upon it, some negro houses, a cow house, well and spring house. The plaintiff applied to the circuit court of Davidson county, under the act of 1845, ch. 1, chartering said company, for the appointment of commission-

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ers to assess the damages sustained by him, in consequence of the location of said road upon his land. This was at May Term, 1850, when five commissioners were appointed. At October Term, 1850, the report made by said commissioners, was quashed for informalities in their proceedings, and five other men appointed. A majority of these commissioners, "assess the loss and damage at two thousand dollars;" and that the "benefit and advantage the said Woodfolk has received from said road, consisting of the increased value of his said premises, amounts to the sum of two thousand five hundred dollars, at least." So, they allow him nothing. From this report, he appealed to the court, and the cause was tried by a special jury, before the court, at January Term, 1852. A verdict was rendered in favor of the plaintiff against the defendant, for seven hundred and fifty dollars. The defendant moved for a new trial, which was overruled, and appeal in error to this court.

The bill of exceptions contains the evidence on which the verdict was found. It consists of the survey and description of the lot; the tract of the road through it, and the opinion of witnesses, as to the injury done to the plaintiff, on the one hand, and the enhancement of the value of his property, on the other.

The injuries enumerated, are of this character: cutting off the plaintiff from his well, spring-house, &c.; the necessity of moving out-buildings; erecting a stone wall in the cut made for the road, to keep up the ground, and prevent accidents; detracting from the beauty and comfort of the lot, as a family residence, &c.

Against all this, on the other hand, it is proved, that his lot is enhanced in value, in the market, by the erection of the road, from twenty-five to fifty per cent.

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On all these points, the proof is, as it must be, when consisting of the opinions of men on any subject, very conflicting, and unsatisfactory, on all the items of account, on both sides. It must necessarily, partake more of the nature of guessing, than of certainty.

The law was laid down by the circuit judge in his charge, in part, and so far as it is necessary in our examination, as follows: "You will recur to the testimony, and ascertain from that the value of the land taken for the road, and take into consideration such other inconveniences and damages, as shall have resulted to the plaintiff from the acts of defendant. You will estimate what damages the plaintiff may have suffered, if you shall think that any have accrued; then you will look to the testimony in the cause, and ascertain whether the acts of the defendant, in locating the road upon the land of the plaintiff, have resulted in benefit, or advantage, to him. On ascertaining this, you will determine whether the lands of the plaintiff have appreciated in value. You will not look to the fact, that this road is a public benefit or advantage, unless that public benefit or advantage be inseparable from the benefit conferred upon the plaintiff. If any advantages have resulted, you will determine what they are, and assess their value. You will then take the amount of benefit or advantage from the amount of damages, and the remainder, if any, will make your verdict. In ascertaining the benefits and damages, you will confine yourselves to the time when the defendants appropriated the land of the plaintiff to the use and construction of the road."

Thus is the law laid down by the circuit court, and both parties are dissatisfied with it. The defendant brings

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up the case by appeal, and the plaintiff by writ of error. It now devolves upon this court, to settle the law, and indicate the proper rules for this and all other cases of the kind; and there will doubtless be many in future, as the spirit of public improvement has now taken possession of the minds of the people, and guides the public counsels of our State. They should be such as will guard the rights of the citizens on one hand, and not improperly impede the cause of public improvement on the other. A wide range has been taken in the argument, evincing learning, research and ability, on the part of the counsel, worthy of the importance of the subject, as well as profitable to the court. We feel much indebted to this full and able examination, and presentation of the questions involved, both upon principle and authority, for the opinion we have been able to form on this most vexed and perplexing subject. We have had the advantage of all the lights that could be brought to the elucidation of the questions involved, by the best legal talents, and most profound research.

It would, at this day, be worse than useless, to enter into a discussion of the existence and extent of the right of eminent domain, and to prove that it is inherent in this, and all other governments. That is now well settled, and admitted on all hands, to exist in every State and country. No one now questions the right of the State to take private property for public use, against the consent of the owner. Questions frequently arise, and may come up again, as to the extent and right exercise of this conceded power. But it is not controverted, that it applies to the case of public roads, and that rail roads, whether constructed by the State, or chartered companies, are of that character. The land of

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the plaintiff has been taken for this purpose, and was therefore, legally and rightfully taken. But he has a corresponding right, which is as clear, well guarded, and indisputable, as the other; a claim for the value of his property. The State may take his property for the public use, but the State must see that the public pays him for it. The people, in whom the sovereign power properly resides in this free country, were not willing to leave this dangerous, though essential right of eminent domain, (a power to deprive a man of his property, against his consent,) unguarded by barriers of a permanent nature, inserted, in their constitution, restrictions upon it. They impliedly delegate the right, but protect the citizen, and secure to him the value of his private property. The provision for this purpose, in the federal constitution, is: "*Nor shall private property be taken for public use, without just compensation.*" Amendments, Article V.

But this, as well as other provisions of the same character, are intended solely as limitations on the exercise of power by the general government, and is not applicable to the legislation of the States. The State constitutions are framed by different persons, and have distinct objects in view. The State governments are not restricted by the limitation of a power, expressed in general terms in the constitution of the United States. The States must be included in terms, or necessary implication in such limitation or negation of powers, or they are not affected; *Barrow vs. The Mayor of Baltimore*, 7 Peters, 243; 2 J. J., Mar. 45.

The constitution of the United States, cannot, therefore, be looked to for the rule to govern us in this case. But the people of this State, and perhaps most, if not all

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the others, being equally jealous of the abuse of power, saw proper to restrict and limit the power of the State government on the same subject. Our people, in their State convention, make this provision: "No man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor;" Article I, § 21.

The power to take private property, for "public use," is here impliedly admitted; and the legislature undoubtedly possess it, with the limitation prescribed; that is, by making just compensation. This is only in affirmance of the great principles of the common law. The important, and only question in this case, is, what is meant by "just compensation?" How is it to be ascertained; and how, when, and in what paid? When this is settled upon a fair construction of that instrument, it must prevail, and no act of assembly can change or alter it. All laws are subordinate to this supreme law, and must yield to it, as they are null and void when they come in conflict with it. It follows, therefore, that if the legislature attempted in this charter, to substitute any other compensation for private property taken for this road, or directly, or by indirection, deprived the citizen of that "just compensation," in whole or in part, which is secured in the organic law, it has transcended its authority, and trespassed upon sacred ground. If it should be our opinion that this has been done, it becomes an imperious duty, delicate and unpleasant as it may be, to sustain the constitution, which we have sworn to support, with a firm hand. That must stand, no matter what else may fall. It must be guarded with untiring and sleepless vigilance from all attacks. Upon the judi-

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ciary, this important duty devolves. The people can only look to this department of the government for protection, when their constitutional rights are invaded. It should be a pleasant, though delicate duty, to those they have thus entrusted with the power, to exert it on all proper occasions, for their security against wrong.

Then what is the power of the State, and the rights of the citizen, in the question now before us? The former may take the private property of the latter, for public use, as has been done in this case. The citizen has a concomitant right, founded in the constitution to a "just compensation." How is this right to be asserted? It is certainly the duty of the government to provide some fair and proper mode of ascertaining the value of the property taken, where it cannot be agreed upon, by the parties, and to make provision also, for the payment, when it is ascertained in the mode and manner contemplated by the constitution.

The charter of the defendant was granted in 1845, ch. 1. The twenty-fourth section regulates the mode of ascertaining the damages to individuals, and the manner of compensating them for lands taken for the road. It provides that where the land cannot be purchased, or the price agreed upon, "the same may be taken at a valuation to be made by five commissioners, or a majority of them, to be appointed by the circuit court of the county where some part of the land, or right of way, is situated," who shall take an oath "faithfully and impartially to discharge the duty assigned them. In making the said valuation, the said commissioners shall take into consideration, the loss or damage which may occur to the owner or owners, in

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consequence of land being taken, or the right of way surrendered, and also, the benefit or advantage he may receive from the erection or establishment of the railroad, or work, and shall state particularly the nature and amount of each, and the excess of loss or damage over and above the benefit and advantage, shall form the measure of valuation of said land or right of way. The proceedings of said commissioners, accompanied with a full description of said land, or right of way, shall be returned under the hands and seals of a majority, to the court, from which the commission issued, there to remain of record."

Either party may appeal and have a new valuation by a jury in court, where verdict shall be final, unless a new trial is granted. "And the lands, or right of way, so valued by the commissioners, or jury, shall vest in the said company in fee simple, so soon as the valuation may be paid, or where refused, may be tendered."

It is further provided, that an appeal is not to stop the work, nor can the same be delayed by injunction, or supersedeas. But in case the appeal is by the company, surety must be given to pay whatever may be awarded in the court.

Here is a full and vigorous exercise of the power of eminent domain. The fee simple title is vested in the corporation. No objection is made, nor do we see any, under the construction that a jury trial, in the regular common law mode, is adopted in case of appeal, to the provision made in this section for settling the rights of the parties. But the contested and embarrassing question, still arises upon the rule prescribed in this law, for ascertaining the "just compensation" to

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the owner of the land, the use and title of which he is thus forced to surrender to the corporation. On the one hand in making the valuation of the land, the "*loss or damages*" which may accrue to the owner by taking the land," is to be fixed; on the other, the "benefit or advantage" to the owner from the erection of the road, is to be estimated, and the excess of the former over the latter, in the language of the act, "*shall form the measure of the valuation of said land.*"

Is this the measure of "compensation," prescribed in the constitution? Was the compensation secured to the owner for the loss of his property to be paid in money, or may it be made in other property, or incidental "benefits and advantages?" Was it intended, that the citizen should not only be forced to give up his land for the common or public use, but to take in payment for it, any thing it might suit the party taking it, to offer? If such be the true meaning of the constitution, it is certainly a poor protection of private rights against the exactions of power, and is only calculated to excite false hopes of security. By the supreme law, the legislature are empowered, where, in their opinion, the good of the whole people requires it, and for the use and benefit of the whole, to compel him who owns property to give it up, upon the payment to him by the same public, for whose use it is taken, a "just compensation," or, in other words, a fair price, or the value in money, for the property taken.

He cannot be paid off in "benefits and advantages," which are thus forced upon him, against his consent. He may be compelled to submit to the encroachment upon his private rights, when they come thus in conflict with the public interest, but with the charter of his

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liberties in his hand, he can say to the powers that be, "thus far shalt thou come and no farther." In the appropriation of the property, the public power is exhausted. It cannot be allowed to prescribe how much and in what he shall be paid. The value of the thing taken, must be assessed by a just and proper tribunal, and the amount paid, in the lawful coin of the United States—in money. It is a debt against those who take the property, and must be paid like all other debts. The creditor in this case, cannot be coerced to receive as compensation, ameliorations of his remaining property, or the enhancement of its value, nor any other "benefit or advantage," either real or imaginary, that may be conferred upon him. He may not wish to part with a portion of his land to have the price of that which remains enhanced. The increase of price without any improvement of its fertility or beauty, is no advantage to him, if he does not wish to sell; it only increases his public burthens in the way of taxation. What others might regard as a great "advantage and benefit," he might consider a decided injury. If his lands are appreciated, and his facilities of travel and trade increased by this improvement, these are benefits to which he is entitled, with the community in general, and for which, he has to pay, in common with others, in taxes and other burthens. But there can be no good reason, why any more should be taken from him than others, for these common benefits.

Then we arrive at the conclusion, that the plaintiff is entitled to the value of the land, taken from him by the defendants, in money, and that this value, when ascertained, cannot be liquidated in whole, or in part, by any "benefit or advantage" he may in fact or by supposition, derive from the making of the road, in the

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appreciation of his remaining land, or otherwise. But on the other hand, it would be unjust to make the public pay the enhanced price, that would result from the fact that the road had been located at that place.

It is difficult to lay down any very definite rule for the government of commissioners and juries on this subject, which will be of easy practical application in every case. Yet, it is highly important, that some principle be settled, and the extent of its application to peculiar circumstances defined, calculated to produce uniformity, and rid the subject of that vague and indefinite character which now seems to perplex the minds of those who have to act upon it. We consider the proper rule to be this, that the fair cash value of the land taken for public use, if the owner were willing to sell, and the company desired to buy that particular quantity, at that place and in that form, would be the measure of compensation. It is not in the nature of a wrongful taking, for which damages are to be assessed. Nor is it a claim for any wrong or damage done, but the appropriation of the property is legal and rightful, as much so as if the owner had voluntarily sold it to the company, and the only open question was, what is a fair price for the property? What is its value? Now, from this definition of the nature of the transaction, it will follow, that there can be nothing added to the price on account of the unwillingness of the owner to part with his land, or to have the improvement there, or because he may have to build fences and walls, or be put to inconvenience in getting to his out-buildings, or have them to remove, or such like inconveniences. These things do not enter into a just idea of a just compensation for the property actually taken, but are

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incidental to it, and are provided for in another form by this charter, as will be presently shown. These considerations are not to enter into the estimate of the jury to enhance the price, but on the other side, the value is not to be reduced by the consideration that the improvement about to be made, will be advantageous to the owner in the amelioration and enhanced value of his remaining land, the increased facility in travel or trade it will afford him, or the location of a depot or town upon his land. To all these, and such other incidental advantages as may result to him, he is entitled, in common with other citizens; and for which, he pays in taxes and other legal burthens imposed by government. If such special advantages accrue to him in consequence of the public improvement and that particular location of the road, it is an incident to his right of property, and a benefit for which no one has a right to make him account, in fixing the price of other property taken against his will. The following circumstances and considerations should enter in this estimate of value or compensation.

1. The quantity of land taken. It would not be reasonable to fix the price of one acre, or the fourth of an acre, at the general rate of the whole tract, or a larger quantity. This would be selling by retail, and ought to be at a higher price, for the quantity taken.

2. The place where the land lies, which is thus appropriated, with reference to external circumstances. Is it in the country, a village, or city? With reference to remaining land, is it taken on the outer line, with the bed of the road only, on the land; or does it run so as to divide the land in a regular, or awkward form? through a garden? stable lot? or the family yard? between the

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dwelling house and kitchen? or under either of them? and if so, are they of great value? or of but little value? Is it so run as to cut off from the main lot, a portion of ground, that for quantity or form is saleable, or not? So, upon this point, the rule must be as first laid down, in general terms; the quantity taken, and place and form in which it is taken, must be looked to in fixing its value.

3. Any general effect, that the actual or contemplated erection of the rail road, or, special effect of the location of it at that particular place, may have upon the value of that land, whether it has been to improve or lessen the price, is not to form an element or be considered in the valuation. If the value is elevated by the work, he should not have the advantage of it, because we do not make him account for the increased value of the remainder of his land; and if the value is reduced by it, he should not suffer, because he is forced to part with his property for that purpose, against his will.

4. The incidental advantages, and disadvantages, benefits and injuries, are to be left entirely out of view. The owner's unwillingness to sell, or to the location of the road on his land, or near his house, on the one hand; and the necessity the public is under to have the land at that particular place, on the other, are to have no influence on the price. The property is to be valued on the same principles and considerations, as if both parties had agreed upon the sale, and had referred the single question of the intrinsic value of that particular property, to the commissioners. The consideration for his property, to which the owner is entitled, being thus ascertained, it must be paid to him in money. To compel him to

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take any thing else, would render the constitutional guarantee, ineffectual and delusive.

Here, the constitutional provision ends; its inhibition upon the government goes no farther. The legislature may make any regulations it thinks right and proper for an account, or estimate of incidental "loss or damage," or injuries to the land owner. These may consist of the necessity created for the building of new fences, the removal of buildings, separating him from his spring, well, mills, negro houses, barns, &c. And against this, may be set off, the "benefits and advantages" to the owner, in the enhancement of the value of his remaining land, of the same, or any adjoining tract, his increased facilities of travel, &c. We think the legislature have the power to do this; and if required by the petitioner, the court would be bound, under this charter, to direct the commissioners, or in case of appeal, the jury, to make the estimate on both sides, upon the basis here stated. But this must be separate and distinct from the valuation of the land, for the purpose of ascertaining the compensation required by the constitution, and cannot be blended with it, or in any way enlarge or reduce it. It is true, that the nature of the items on both sides of this account, would be of a very vague and indefinite character, depending before commissioners, upon their opinions upon the view and examination of the ground, and before a jury, on appeal, upon the opinions and fancy of witnesses. But for that, no remedy or definite rule can be furnished, which will clear the subject of its inherent difficulties. But this enhancement of the price, which may be taken into the account against the petitioner, must be confined in the estimate to the lot or tract, through which the road runs, or to lots or

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lands, which adjoin it, and to such improvement in value, as is the result of running the road at that particular place, and not to the general rise of property in the country, or that neighborhood, produced by the public work. That which is common to all, should not be charged to him, because this is an advantage to which he is entitled as a citizen and tax payer of the State.

To these conclusions we are brought, by what seems to us, a fair construction of our own constitution. And we find, that we are fully sustained in them, by the court of appeals of the State of Kentucky, in the case of *Jacob vs. The City of Louisville*, 9 Dana, 114. In that case it is stated, that the same principles had been adopted in *Sutton's heirs vs. The City of Louisville*, 5 Dana, 28, and in *Rice vs. Nicholasville, Danville and Lancaster Turnpike Company*, 7 Dana, 81. The language used in the constitution of Kentucky, is substantially the same as ours on this subject.

We are aware that in some of the States, contrary and conflicting views have been entertained on some of the points now decided. It would be a useless extension of this opinion, to review them, as it could be productive of no advantage. The diversity presented may be partly attributed to the different constitutional provisions on the subject, and to the fact, that some of the State constitutions are entirely without any such provisions. And again, the legislative enactments, and the form in which the questions have been presented to the courts, have been so variant, and dissimilar, that the diversity seems at first view, to be greater than it really is, upon closer examination.

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But, we are fully satisfied with the construction now given, and though we entertain very great respect for decisions of other States, we cannot yield to them as authority, any farther than they are sustained in our judgment, by sound reason and settled principles.

For the errors in law above indicated, in the charge of the court below, we reverse the judgment in this case, and remand the cause for a new trial on the principles laid down in this opinion.

BARNES vs. WHITE.

SHERIFF. *Liability of, for an insufficient return of an execution. Waiver.* The fact that the plaintiff in a judgment has an *alias* execution to issue, and receives a partial payment of his judgment, after the sheriff has rendered himself liable by an insufficient return of the first execution issued, is no waiver of the right to have judgment by motion against the sheriff, for the remainder of the judgment, and the damages given by the statute.

SAME. *Bond.* In a proceeding by motion against a sheriff, upon his bond, for the insufficient return of an execution by the sheriff, it need not appear that the bond was recorded in the county court.

This judgment was rendered, as stated in the opinion, at the May Term, 1852, of the circuit court for Davidson county, MANEY, Judge, presiding. The defendant appealed in error.

TRIMBLE and REID, for plaintiff in error.

EWING & COOPER, for defendant in error.

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TORREN, J., delivered the opinion of the court.

This is a motion against the late sheriff and his sureties for an insufficient return. The execution in favor of White, the plaintiff in this motion, against Edwin W. Hickman and others, for one thousand seven hundred and fifty dollars and eleven cents, was issued from the circuit court of Davidson, on the 5th July, 1851, on which the sheriff made this return: "Came to hand same day issued; not satisfied; 10th Sept., 1851." An alias execution was issued, under which land was levied upon and sold, and the nett proceeds, two hundred and forty-nine dollars and fifty-nine cents, paid to the plaintiff. A *pluries* execution was issued and levied upon slaves, and the sale was enjoined in chancery at the instance of P. B. Hickman. There was judgment against the sheriff and his sureties, and they have appealed in error to this court.

1. The return "not satisfied," without assigning any reason for it, is, of course, insufficient, and the sheriff, when he made that return, became and was liable to a motion, under the statute of 1839, ch. 19, § 6, for an *insufficient return*.

2. If the plaintiff cause an *alias fieri facias* to issue, and receive part of his judgment, that is no release of the liability of the sheriff for the balance of the judgment, and the damages given by the statute; and is no waiver of the plaintiff's motion against him to enforce it; *Doyle vs. Elwin*, 4 Humph. R., 309.

Certainly the liability of the debtor continues, and there can be no reason why an attempt to enforce it, shall release the plaintiff's right to a motion against the sheriff, that accrued to him by reason of the sheriff's malfeasance or non-feasance in office; for it is to his

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advantage that the judgment be paid by the debtor. It is true, that in such case the sheriff would still be liable for the twelve and a half *per cent.* damages, given by the statute as a penalty, notwithstanding the debtor had satisfied the judgment against him, after the sheriff's liability accrued. But if the creditor collect all or any portion of the judgment, the sheriff is entitled to a credit for the amount collected; otherwise, the creditor would receive a double payment, which the statute giving the motion did not intend. This is not like *Trigg vs. McDonald*, 2 Humph. R., 386. That was a motion for a false return, and it appeared that the sheriff had made four hundred and sixty-four dollars and forty-seven cents, which was paid to the plaintiff at the return of this writ; with a full knowledge on his part, as we are to presume, of all the facts in the case. He thereon made his motion for a false return, and the motion was denied upon this and other grounds.

The money was received upon the same return that the creditor impeached; and as he thought proper, in view of the facts of the case, to take a benefit under the return, and thereby, in effect, to sanction it, that was considered a waiver of his right to the motion. Such, we consider, is the doctrine of that case, and we refer to it for no other purpose than to distinguish it from the present. Here the money was received on an *alias* execution, not on the one where the return is impeached as insufficient.

3. It is said that the bond was not recorded in the county court. It does not appear whether it was recorded or not. The record exhibits an attested copy, and it appears that the bond was properly given and acknowledged before the county court. If it were not recorded, that

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would be immaterial; for the defect is cured by statute 1844, ch. 103, §§ 11 and 14. We consider that this statute, though somewhat obscurely worded, applies to the official bonds of sheriffs, constables, &c., and is not confined to revenue bonds merely. The 11th section speaks of "the bonds of all officers" taken by the county court; and the 14th section, of suits or motions on official bonds, at the instance of the State or a *private* person. Now, this section cures most, if not all the formal defects in official bonds, heretofore indicated in the judgments of this court; and declares that such bonds shall be considered as statutory in the same manner as if taken in strict conformity to the several statutes on the subject. It need not appear that the bond was recorded. We think it very clear that the sheriff is liable to the motion, and order the judgment to be affirmed.

Judgment affirmed.

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SWANSON vs. SWANSON.

LEGITIMATION. *Effect of. Distribution.* Children not born in lawful wedlock, but legitimated, are, as against the widow of the intestate, entitled to succeed to the personal estate of their putative father, under the statutes of distribution.

SAME. *Construction of statutes on the subject.* The courts, in construing statutes, conferring the right of legitimation, whether they be public or private acts, will give them a fair and reasonable, if not a liberal construction; and hence, though a private act confers upon the persons legitimated, the power to "inherit, in the same manner as if they had been born in lawful wedlock," and though the act of 1805, ch. 2, authorising legitimation by the courts, declares the person so legitimated, shall "become heir, or joint heir," of the putative father; still, the words, "inherit," "heir," "joint heir," used in the statutes, must be construed as conferring upon the persons so legitimated, all the rights of inheritance and succession that would attach to them, had they been born in lawful wedlock.

HUSBAND AND WIFE. *Marital right. Slaves.* Upon the marriage of a feme sole, who is vested with a life estate in a given number of slaves, and an absolute estate in an undivided moiety of them, the husband, upon reducing the slaves to possession, becomes the owner of the life-estate of his wife; but his marital rights do not attach to her moiety, until division, whereby his wife may have a complete specific right to the slave, or slaves, set apart to her by the division.

This was a bill filed in the chancery court at Franklin, upon the facts, and for the purposes stated in the opinion. At the October Term, 1851, Chancellor FRIERSON, presiding, there was a decree for the respondents, and the complainant appealed.

EWING & COOPER and CAMPBELL, for complainant, argued: The act of the Legislature, legitimating two of the defendants, merely changes their names, and enables them "to inherit in the same manner as if they had been born in lawful wedlock." Private statutes are construed strictly, and none more so than those legitimating persons characterized by the common law, as "*nullius filius*;" *Drake vs. Drake*, 4 Dev. L. R., 110; *McCormick vs. Cantrell*, 7 Yerg., 615; *Perry vs. Newsom*, 1 Ire. Eq., 28. The act in this case, only confers the power "to inherit;" an

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expression, bearing a definite legal meaning, which would limit the inheritable capacity to the real estate.

The decree of the court legitimating the other two defendants, is under the act of 1805, ch. 2. That statute only authorizes an illegitimate person to be made "heir, or joint heir," of the person petitioning. These words have a definite legal meaning which would limit the inheritable capacity to the real estate. The phraseology of this statute, as well as of the private act, seems to indicate a settled design on the part of the legislature, to limit the substitution of illegitimate children to the rights of those born in lawful wedlock. Was this not intended expressly for the protection of those entitled as next of kin?

The statute of 1844, ch. 211, under which the complainant claims, gives to the widow of an intestate, "*leaving* no *legitimate* child, or children, or the descendants of such," all the personalty. Does not this language exclude illegitimate children?

The complainant, we insist, is entitled to the negroes derived from Theobald's estate. First: because there is no proof of assent to the legacy; nor are the circumstances and lapse of time, sufficient to imply such assent. Secondly: because there was no division of the negroes, to which complainant had only a life-interest, and those to which she was absolutely entitled; 10 Yerg., 190; 11 Humph., 425; 5 Ves., 515; 2 Call, 447; 2 Yerg., 557.

FOSTER and MARSHALL & FIGURES, for respondents argued: That the general assembly of the State of Tennessee, under the first constitution, had the power, by special legislation, to make children born out of lawful

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wedlock *legitimate*, has been decided by the supreme court of the State; 7 Yerg., 615.

It is supposed that in the absence of constitutional prohibition, legitimation by private acts of the legislature is a matter of ordinary legislation; *Drake vs. Drake*, 4 Dev. R., 110; *Perry vs. Newsom*, 1 Ire., 28.

The question now is, has the legislature legitimated the defendants, James and Mary, by the private act cited. The words of the act are: "Be it enacted, that the names of James Nail and Mary Nail, illegitimate children of James Swanson, of Williamson county, be and the same are hereby changed to that of James Swanson and Mary Swanson, and they are hereby enabled to inherit in the same manner as if they had been born in lawful wedlock."

It is contended by the complainant, that as the word "*inherit*," is used, and not the words, *succeed to*, that the children could, to be sure, take real estate from their father, but were not enabled by the act to take his personal estate; in other words, that the word, *inherit*, must be confined to its technical signification. It is to be observed, that neither the real nor personal estate of the father is mentioned in the act.

The old elementary writers never say a bastard cannot take a distributive share, they only say that he cannot inherit; 4 Black. Com., 408; and the reasoning is that as he is *nullius filius*, he can have no inheritable blood in him. And Selden says, that by the laws of England, bastards were excluded from *inheritance*, unless there was a subsequent legitimation; 2 Kent Com., 212. This, by the common law was the great disability of the bastard, and the word, *inherit*, was the most apt, enabling word that could be used. On the construction of statutes,

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the following authorities are cited, whether the statutes be public or private; 1 Kent Com., 459-460, and note b, 461, 463-4-5.

The real intention of statutes must prevail over the words; 15 Johns. Rep., 358, 380; 14 Mass. Rep., 92.

When the expression in a statute is particular, and the intention general, the expression shall be made general; 10 Coke, 57; 4 Kent Com., 462, note f.

The intention of the act is manifest; the incapacity of the children to take property from their father was what was intended to be removed by the act, and not the incapacity to take *a part* of his property, and not the balance of it. The father's name is given to the children, and they are to inherit or *take* as if born in his lawful wedlock. The word, child, in the statutes of distributions, always means, the *child who is heir*. So it is in England; that is, the word, child, in the statute of distributions means the child who is or might be heir. See the various modes of expression adopted in the private acts of the general assembly legitimating bastards, in other cases, where the intention was to legitimate generally.

It will be observed, that all statutes of legitimation, of descents and distributions, are in *pari materia*, and are to be construed in reference to each other. The Act of 1766, ch. 3, (Car. & Nich., 252,) has not the word *legitimate* in it; nor has the act of 1784, ch. 22, § 8. The argument based upon the presence of that word in the acts of 1827, ch. 14; 1844, ch. 211; and 1846, ch. 210, amounts to nothing.

Technical language has not been employed with any precision in any of the statutes of descents or distributions. The words *inheritance of lands*, in the act of 1829,

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ch. 36; in the act of 1823, ch. 28, the word *disinherited*, means excluded from both real and *personal estate*, and the words, *succeed to*, without other words, apply to *real* and *personal estate*; and in the act of 1796, ch. 14, the words are: all *real estates of inheritance*, as well as *personal*, shall *descend to*, &c.

The act of 1825, ch. 15, provides that it shall not be lawful for any child of color, to *inherit* the estate of its mother's husband. Under the construction of this act, could such child succeed to the *personal estate* of its mother's husband, he being a white man's child? Certainly not.

It is, therefore, contended, that the defendants, James and Mary, are made legitimate children of the intestate, by said private act, and entitled, under the statutes of descent, to portions of his real and *personal estate*.

It is further contended by complainant, that, at most, the act of 1805, ch. 2, would authorise these defendants to be made heirs, if it does not authorise them to be made distributees. This being a statute of descents and distributions, as we contend, it must be construed with all other laws on the same subject. All the remarks made on the word, *inherit*, on a previous point in this cause, are applicable on this point; and it may be remarked, that the provisions of this act strengthen the position taken for the defendants, James and Mary, on that point. It may also be remarked, that the word *heir* is very often used in common parlance, for child, and in statutes and deeds, to include heir and next of kin.

McKINNEY, J., delivered the opinion of the court.

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This was a bill filed in the chancery court at Franklin, for the settlement and distribution of the estate of James Swanson, sr., who died intestate on the 25th of March, 1850. The intestate, at the time of his death, was owner of a large estate, both real and personal, situated, in part, in this State, and in part, in Mississippi. He left surviving him, the complainant, who is his widow, but no child, or the issue of such, born in lawful matrimony.

The defendants are his *natural* sons and daughters, born long prior to his marriage with the complainant, and claim, by *legitimation*, the right of inheritance and succession to his estate. And this right, asserted by them, which is not admitted by the bill, gives rise to the principal question for our determination in the cause.

In the discussion here, the question is properly narrowed down to the enquiry, whether or not, the defendants are, by law, entitled to succeed to the *personal estate*, under the statutes of distribution; their right of inheritance, as respects the real estate, not being seriously questioned.

The incapacity of defendants to take, as distributees, in this case, is placed upon two grounds: The first rests upon the peculiar phraseology of the act of 1844, ch. 211. The second is, that the legal effect of the legitimation relied on by the defendants, was merely to confer upon them the capacity to take, as *heirs*, and not as *distributees*, of their putative father, the intestate.

These objections to the competency of the defendants to take the personal estate, however plausible at the first view, are not tenable. First: The act of 1844 declares, "that hereafter, when any person shall die intestate, leaving no *legitimate* child, or children, or the descendants of such, living, but leaving a widow; then, and

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in that case, the said widow shall be entitled, after the payment of all just debts, to the whole of the personal estate, absolutely, of her deceased husband, in addition to the dower of real estate, as heretofore allowed by law."

It is argued, that, by force of the word, "legitimate," in this act, the intention is sufficiently manifest, that in favor of the widow, a child or children of the intestate, not born in lawful wedlock, should be excluded altogether; and consequently, that, under the statute, legitimation confers such natural child, or children, no right of succession whatever, as against the widow.

This construction is wholly inadmissible. It would be to make the statute wholly inconsistent with the general law, providing for the legitimation of natural children; and as to all cases, falling within the act of 1844, would render legitimation, a mere idle ceremony, of no effect whatever. The word, "legitimate," as used in this statute, is obviously put in opposition to *illegitimate*, and not in contradistinction to *legitimate* children. And in this view, it can have no force or effect, whatever, in the construction of the act. It is a mere expletive, and altogether unnecessary to have been used; because, by the established principle of the common law, as also, of our statutes of descent and distribution, illegitimate children were excluded from all right of inheritance and succession.

We proceed, then, to consider the validity and effect of the alleged legitimation of the defendants, and the extent of the rights thereby conferred upon them. In this investigation, we can derive but little aid from the common law. The doctrine of the civil law, upon the subject of the legitimation of bastards, was never admitted into the common law of England. Its introduction, we learn, was attempted by the bishops in the reign

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of Henry the III. But, it was sternly and successfully resisted by the barons; not so much upon principle, as has been said, as from their extreme jealousy of the civil law, and utter unwillingness to yield to its superiority over the common law, in any respect.

By the Roman law, there are two modes by which children, illegitimate by birth, may be rendered legitimate. The one is, *per subsequens matrimonium*; the other, *rescripto principis*; by the subsequent marriage of the parents, or by the letters of the Sovereign. See Burge's Colonial Law, vol. 1, p. 92.

But by the stern principles of the common law, a child born out of lawful matrimony, is a bastard, notwithstanding the subsequent marriage of the parents. He is treated as the son of nobody; has no inheritable blood; is denied all rights, of whatever nature, founded on a claim of kindred; and is regarded as having no rights, except such as he can personally acquire; even the right of a *surname*, he can acquire only by reputation, and when thus acquired, it serves in law, only as a description of the person; and, hence, he cannot take otherwise than merely by the description and name gained by reputation; 1 Bl. Com., 459.

In England, there is only one possible mode in which a bastard may be made legitimate, and that, in the language of Blackstone, is, "by the transcendent power of an act of Parliament, and not otherwise." An instance of legitimation, in this mode, is given in the reign of Richard the II, in the case of the Duke of Lancaster's children, born before marriage; 1 Bl. Com., 459; 2 Kent Com., 209.

The severity of the common law, in its condemnation of the policy of legitimation, has been a good

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deal relaxed in several of the American States. And this proceeds upon the principle that the relation of parent and child, which may exist, in all its natural force, between the putative father and his innocent, though illicit offspring, ought to be permitted, at the will of the parent, to carry with it all the legal consequences of that relation.

In this State, and several other States have adopted the same rule, a bastard may take the estate of the mother, (dying intestate, leaving none other than illegitimate children,) under the general rules of descent and distribution. So, in several of the States, statutes have been passed, adopting the principle of the civil law, by which children, born before marriage, are legitimated by the subsequent marriage of their parents. And, in a number of the States, general laws exist for the legitimation of natural children, and in some, including this State, numerous private acts have been passed, from time to time, to legitimate particular individuals born out of lawful wedlock; 1 Bouvier's Inst., 133, 135.

The competency of the legislature, by general laws, to provide for the legitimation of bastards, is not questioned; nor could the power of the legislature to pass private laws, legitimating particular individuals, have admitted of any question prior to the prohibition against special legislation, introduced into the amended Constitution of this State in 1834, Article XI, § 7.

The legitimation of persons born out of lawful wedlock, is to be regarded, then, not only as a settled, but likewise as rather a favored policy, in the legislation of this, and other States of the Union. And, therefore, the courts, in the exposition of statutes conferring this right,

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whether they be general or private acts, are to give them at least a fair and reasonable, if not a liberal construction.

In the case under our consideration, two of the defendants claim to have been made legitimate by a private act of the legislature, passed on the 26th of July, 1820, which enacts "that the names of James Nail and Mary Nail, illegitimate children of James Swanson, of Williamson, be, and the same are hereby changed to that of James Swanson and Mary Swanson; and they are hereby enabled to *inherit*, in the same manner as if they had been born in lawful wedlock."

The other two defendants were declared legitimate by a proceeding in the common law and chancery court of the city of Memphis, on the petition of said James Swanson, sr., in proper person, pursuant to the general law of 1805, ch. 2. That statute empowers the court, on the petition of any person wishing to make any child, not born in wedlock, legitimate, and an heir, or joint heir, to his, or her estate, to alter the name of such illegitimate person, and to declare "that said person, made legitimate as aforesaid, has become heir, or joint heir, of the person petitioning."

The order and decree of said court directs, that the name of Cataline Burk, be changed to that of Cataline Swanson; and that the name of James Monroe Whites, be changed to that of Monroe Swanson, "and that they be, and are hereby constituted heirs and joint heirs at law of the said James Swanson, the petitioner, being legitimated upon his petition, and rendered capable of inheriting from him, and of being his distributees, as if they, and each of them had been born in lawful wedlock."

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The position assumed by the complainant's counsel is, that the legitimization of the defendants, in either of the foregoing modes, confers upon them, at most, simply the capacity to take as *heirs*, and not as *next of kin*, under the statute of distribution.

It is unquestionably true, that the defendants have no inheritable capacity, except such as may have been, either expressly, or by necessary implication, conferred upon them by law.

The private act, legitimating two of the defendants, entitles them "to inherit in the same manner as if they had been born in lawful wedlock." And, by the public act of 1805, under which the other two defendants were declared to be legitimated, they are constituted "*heirs or joint heirs*" of their putative father. A rigid adherence to the strict letter of both these acts, would certainly lead to the conclusion maintained by the counsel for the complainant; but such literal construction would obviously be in direct opposition to the fair meaning and intention of the legislature.

We need not, for the decision of the present case, stop to notice the well settled distinctions, in the rules of construction, between public and private statutes; for as much as, in our view, the public and private acts under consideration, as respects the extent of the right conferred by them, respectively, on the defendants, must be governed by the same primary and fundamental rule of construction, alike applicable to both, namely, the intention of the lawgiver. And the real intention, when accurately ascertained, will always prevail over the literal sense of terms; 1 Kent's Com., 462. The rule, that technical words are to be taken to have been used in

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a technical sense, though generally true, is not so, when it clearly appears that they were intended to be applied differently from this legal acceptance; *Id.*

The words, "inherit," and "heir," in this technical sense, relate to right of succession to the real estate of a person dying intestate. And when used in a statute, as well as in a will, or other instrument, they will be taken to have been employed in their legal sense; but a clear intention to the contrary, will repel this presumption, and control the legal operation of words however technical; 6 Cr. Dig., 148; 2 Wills. on Ex., 926.

As our notions on the subject of legitimation are derived, in a great measure, from the civil law, there is much plausibility in the suggestion, that the words, "inherit," and "heir," in the acts before referred to, were intended to be understood in the sense of that law. Among the civilians, by *inheritance*, is understood the succession to all the rights of the deceased; and, the title heir is applied indiscriminately to every person called to the succession, and he is entitled to all the estate of the deceased, whether it be real or personal; Story's Confl., § 507.

But, this consideration aside; we take it to be a correct principle, that the same rule of construction, applicable in this respect, to a will or other instrument, should be applied in the construction of a statute, whether public or private. And, with respect to a will, it is well settled, that when the word "heirs" is used to denote succession or substitution, it may be understood to mean such persons as would legally succeed to the property according to its nature and quality. Thus a legacy of personal property to A, and, in case of his death before the testator, to his *heirs*, was decreed

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to belong to the *next of kin*, of A, who died before the testator; 2 Will. on Ex., 950. Such is the settled rule, with respect to the personalty, whenever it clearly appears, that the testator has employed the term "heir," not in its strict and proper acceptation, but in a lax sense, as descriptive of the person appointed by law to succeed to property of this description; 2 Jar. on Wills, 22. So, under the description of *personal* estate, the freehold has been held to pass, where it was clear from the face of the will, that the testator meant, not what is technically understood by the words used, but the real property over which he had an absolute power of disposition; 2 Wills. on Ex., 925.

It is not allowable to suppose that the legislature deliberately intended to bestow upon natural children, the more important privilege and capacity of taking by inheritance, the real estate of their father, and to deny them the less valuable right of succession to his personal estate; or, in other words, to make such children legitimate for the one purpose, and leave them bastards as to the other.

But again: we do not think it essential, that the statute should, in express terms, have declared the right of the person legitimated, to take as *next of kin*, under the statute of distributions. This results, by implication of law, from his being constituted a legal *heir*.

When placed by law, in the state and condition of heir, and invested with the character and capacity of heir, all the rights, privileges and legal consequences incident to that relation and character, are tacitly conferred; and, consequently, the right of succession to the personal estate of the intestate.

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We are of opinion, therefore, that in virtue of the acts of legislation above mentioned, the defendants respectively are invested with the right of inheritance and succession to the estate of James Swanson, the intestate, personal as well as real.

Another question has been made, respecting the rights of the complainant to certain slaves owned and possessed by her, at the time of her marriage with James Swanson, the intestate. For some time previous to said marriage, which took place in October, 1847, the complainant was the widow of William B. Theobald, who died in 1844. By his last will and testament, said Theobald devised and bequeathed to the complainant, all his estate, both real and personal, during her natural life, "one half of which is to be at her disposal at her death, the other half I bequeath to my sister, Mary Thomas, and her bodily heirs, except Madison, (a slave,) which is to be set free at my wife's death, provided for at her disposal; provided he make her a faithful and obedient servant; if not, she is to dispose of him as she thinks proper."

In December, 1844, the complainant was duly qualified in the county court of Maury, as administratrix with the will annexed, of her late husband's estate. Immediately preceding her marriage with the intestate, Swanson, she made a settlement of her administration, and, in October, 1848, some twelve months after said marriage, she resigned said administration, and James Swanson, the intestate, was appointed administrator, with the will annexed, in her stead.

It is not shown that, on the settlement of her administration, in October, 1847, which was two days prior to her marriage with the intestate, there remained any debts

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or liabilities due or unsatisfied, against the estate of said Theobald. Said estate consisted, in part, of a number of slaves, which, prior to, and at the time of, complainant's marriage with the intestate, Swanson, were in her possession; and, after said marriage, passed into possession and control of Swanson, and so remained up to the period of his death, in March, 1850.

On the foregoing facts, we are of opinion, that the complainant must be presumed to have assented to the bequest in her favor of the slaves in question; and thereby she became vested with a life interest in the whole of said slaves, and her absolute interest in a moiety of them. Such was the relation in which she stood to the property, at the time of her marriage with Swanson. And the legal consequence is, that so far as respects the *life interest* of complainant in said slaves, at the time of her marriage, the marital right of the husband attached, he thereby become owner of the life interest in the whole of the slaves; and, on his death, this interest passed to his legal representatives. But, as to the *absolute* interest of the complainant in moiety of the slaves, the marital right of the husband did not attach, on the ground that there had been no division of the slaves. Until division, she had no complete, specific right to any individual slave, or number of slaves; and, therefore, the marital right could not attach upon the remainder interest, as held in a case precisely similar in its facts; *Hall vs. McLain*, 11 Humph., 425.

As respects the slave, Madison, no decree will be made at present. It is contingent whether he is to be free, or to be disposed of by the complainant; and the rights of the parties will be reserved until the happening of the contingency. Decree affirmed.

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DEVISAVIT VEL NON. Pleading. Practice. While it is true that a will may be contested as to some particular clause, or as to some particular bequest, yet, if the contestants plead specially, as to particular portions of the will, denying such to be the will of the testator, and also plead generally, denying the entire script to be the will of the testator, the court may, without error, strike out the special pleas. Under the statutes upon the subject, no particular form of pleading is necessary in making up the issue of *devisavit vel non*. All that is necessary, is, that the paper should be propounded and averred to be the will, by the executors, and a denial that the affirmation is true, by the contestants. The general issue, in such case, brings the will as a whole, and all its parts, into contest.

SAME. Charge of the court. Upon the trial of a general issue of *devisavit vel non*, should the circuit court charge, that if the jury believe there was fraud or mistake, in the making of one or more of several clauses of a will, they should render a verdict for the contestants, it is not such error as would authorise the court to grant a new trial upon the application of the contestants.

SAME. Same. The court, in charging a jury upon the trial of an issue of *devisavit vel non*, is not required to charge as requested in writing, by the counsel, if the propositions submitted to the court for that purpose, are irrelevant to the case, as made out by the proof which has been submitted to the jury, or are inapplicable to the issue, however appropriate they may be in the determination of questions arising out of a construction of the will, by a proper tribunal.

SAME. Evidence. Upon the trial of an issue of *devisavit vel non*, parol proof can not be admitted to show that the testator intended to make any other disposition of his property than such as is directed by the will, that he was deceived as to the legal import of the will; or that there was a mistake of the draftsman, if it clearly appear that the will was read over correctly to the testator, before it was signed, and he was capable of understanding its provisions.

This was an issue of *devisavit vel non* in the circuit court of Bedford county. At the December Term, 1852, DAVIDSON, Judge, presiding, there was judgment for the plaintiffs, and the defendants appealed in error.

E. COOPER and EWING & COOPER, for complainants in error, argued: The first error on the part of the court below in this case, consists in this: that he treats the will as an entirety, and refuses to leave it to the jury to find the instrument propounded, the last will and testament of the deceased, as to part, and not his last will in other respects, should such be their conclusion upon

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the proof. In the ecclesiastical courts, the practice is to propound the will, by a general allegation, or by special allegata as to each part, with great minuteness; and even to offer additional clauses not inserted in the instrument, as parts of the last will, by proper averment, to which these opposed in interest may reply, (see Rep. *passim*.) In the court of chancery the practice is, to make up issues upon the whole will, or upon different parts of it, as may be necessary; *Hippesley vs. Homer*, 11 Eng., Ch. 28. It is a matter of indifference whether, in this State, parties shall be allowed to make up issues upon those portions of the instrument really contested, or be forced to the general issue, provided the jury are, in the latter case, properly instructed; that they may find for part, and against part, as in the case of *Guthrie and wife vs. Owen*, 2 Humph. 202. Here, the circuit judge refused to do either, but charged the law as if the jury were bound to find for or against the entire instrument.

The second error in the conduct of the court below, upon which we rely, was in the failure and refusal to charge that there might be error in the *factum* of a will, by accident or mistake, (outside of fraud upon which he does charge,) sufficient to vitiate the will in whole or in part. "By an ambiguity in the *factum* is meant, not an ambiguity upon the construction, as whether a particular clause shall have a particular effect; but an ambiguity as to the foundation itself of the instrument, or a *particular part of it*. As whether the testator meant a particular clause to be part of the instrument, or whether it was introduced without his knowledge, (which would be fraud;) or whether the residuary clause, or any other *passage*, was accidentally omitted, (which would be mistake

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without fraud.) These are all matters of ambiguity upon the factum of the instrument." And if clear and satisfactory proof, that the "*insertion or omission*" was contrary to the intention of the testator, is produced, the court is bound to pronounce for the will, not in its actual state, but with such error first reformed or corrected, either by the insertion of the passage omitted, or by the omission of that inserted; 1 Williams on Ex'rs., 296, 300; *Fawcett vs. Jones*, 1 Eng. Ecc. Rep., 433; *Castell vs. Tagy*, 6 *Ibid*, 328; *Hippesley vs. Homer*, 11 Eng. Ch. Rep., 28.

Another error was, in the exclusion of the testimony offered in relation to the subsequent acts and declarations of the testator, about, and in reference to the will. However doubtful it may be, whether parol testimony is admissible to supply an omission, (by fraud, or mistake,) there seems to be no doubt that such evidence is admissible upon the *factum*, so as to enable the court, or jury, to pronounce certain parts of the instrument not the testator's will. The declarations of the testator, both before and after the making of the will, are admitted in evidence, to show *intention*. See authorities, *Supra*, and *Weatherhead vs. Sewell*, 9 Humph., *Earl of Newburgh vs. Countess of Newburgh*, 5 Madd., 364; Cowen's Notes to Ph. on Ev., p. 1388.

WISENER, for defendants in error, argued: Did the court below err in striking out the three special pleas put in by the defendants? The question involved is, can a party contest any item of a will, and not the whole will? Must not the pleadings put in issue the execution of the entire paper writing? By the act of 1835, it is provided that "an issue of *devisavit vel non*

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shall be made up under the direction of the court." It does not say, issues. If one party may be permitted to contest one item, the will is only established, or set aside as to that item. Another party being dissatisfied with another item may contest it, and there would be no end to the litigation. Farther, this court have decided, that a proceeding to contest a will, is a proceeding *in rem*, and binds all persons, whether they are parties or not; *Patton vs. Allison*, 7 Humph., 320. This cannot be so, if a party may put in issue any one or two items of a will. It would leave the will as they found it, except as to those items contested.

The act of 1789, ch. 33, provides, that the validity of a will shall be tried by a jury, on "an issue made up under the direction of the court," for that purpose. And this court, in *Hodges vs. Buchanan*, 8 Yer., 186, decided, that as the act only directed one issue, only one could be made up, and the trial of that issue was conclusive upon all the world.

Did the court below err, in rejecting the proof offered by defendants on the trial of the issue? The proof was incompetent, and therefore properly rejected; *Weatherhead vs. Sewell*, 9 Humph, 300, 301; 1 Yer., 404. As to the correctness of the charge of the court, see same authorities.

CARUTHERS, J., delivered the opinion of the court.

This is an issue of *devisavit vel non*, on the will of Joshua Yates, from the circuit court of Bedford county. The contestants are the children of two of his daughters, Malinda and Rebecca, who died before the testator made this will. These grand-children are excluded by mistake, as they insist, from any benefit under the will. The will,

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after making ample provision for the widow, gives the estate to his "children." These grand-children, are, therefore, excluded, contrary, as they contend, to the intention of testator, as expressed before, at the time, and after the writing and publication of the will, by mistake of the draftsman.

This is the ground of contest. Various questions of pleading and evidence arose, in the decision of which, by the court, it is alleged there is error. We will notice them in the order in which they are presented. To the declaration and averments of the executors, in propounding the paper writing, exhibited as the last will and testament of Joshua Yates, deceased, the contestants offer four pleas, tendering issues. The first, second and third, in substance, deny that the sixth, seventh and eleventh clauses, are part of his will. These items are copied into the several pleas, and embrace all the will which bequeaths property to his "children." The contestants are grand-children; and the objects of these pleas are, to raise the question that they were intended to be included, and that their exclusion was by mistake of the draftsman. The fourth plea is general, and is in these words: "And the said defendants say, the said paper writing is not the last will and testatment of said Joshua Yates, deceased, and of this, they put themselves upon the country. COOPER, for defendants."

On this last plea issue is taken, and the other three are stricken out by order of the court. It is contended that this was error; because it is, in effect, denying the right to contest one part of the will, without attacking the whole; or that it is an assertion of the principle that the whole will must stand, or fall, together. We do not understand his honor so to decide. At least, such is not,

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necessarily, the effect of the judgment striking out these pleas. In making up an issue of *devisavit vel non*, under our acts of 1835, ch. 6, § 6; 1836, ch. 5, § 9, and ch. 18, § 2, C. & N., 710, no particular form of pleading is required. All that is necessary, is, that the paper should be propounded, and averred to be the will by the executor, and a denial that this affirmation is true, by the contestants. If the latter choose, for the purpose of saving cost, or any other reason, to limit the contest to any particular clause, thereby admitting and putting out of dispute, the balance of the will, they would have a right to do so; and perhaps it would be error not to allow the issue to be so limited. But it is not necessary here, to decide that question, and we do not do so. In this case, the whole will was put in issue by the fourth plea, and there could be no necessity for the special pleas, if they may be so called. We can see no necessity for a multitude of pleas in this proceeding; it is not contemplated by the statutes. Its effect would be to deprive the proceeding of that simplicity which should characterize it. It would be very easy, if such be the intention of the party, to limit the contest to any particular part, or parts of the will, or to one description of property in a single plea. If it is thought that the will is good as to personality, and not for land, which is the case in *Guthrie vs. Owen*, 2 Humph., 202, for want of the solemnities necessary for the latter, and not for the former; or, as in this case, good as to the bequests to the widow, but not as to those to the children, because of the mistake in omitting the grand-children, the issue could be so formed without any difficulty. But where is the necessity of allowing such partial attacks, together with a general denial of the whole will, as was proposed in this case?

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The only reason for allowing a special, instead of a general plea, or issue, is, to save cost in the investigation. But, if more issues than one are made, and one be general, then the reason fails, and there is no necessity for the special pleas, as the general issue throws open the whole case, and brings the entire will into the contest.

His honor, the circuit judge, it is contended, charged the law to be, that a will could not be sustained in one part and defeated in another. If this be the proper construction of the charge, we could not concur in it, but consider that the law is otherwise. But we cannot see how the defendants could be injured by it, as he expressly charged, that if there was fraud or mistake in the clauses of the will which are assailed, that the verdict of the jury must be for the defendants. The effect of the charge would be to produce a finding against the will to the extent desired by the contestants, and still further. It is true that the charge would have been more correct, if the jury had been informed, that they might find that it was a good will in all its provisions, except the 6th, 7th and 11th items, and as to them, it was not the will of the deceased. But we do not regard it as sufficient cause to reverse, on the appeal of contestants, that the charge went further, and was stronger against the will than they desired. We are told that the jury might have been willing to break the will in part, but not understanding from the charge they could do that, without setting it aside entirely, they might have failed to go to the extent authorized by the proof. We cannot presume that they would find a verdict against the law, as laid down by the court, upon considerations of this kind. It is enough to see, that

[Harrison *et al.* vs. Morton & Brown, *ex'rs.*, *etc.*]

they were instructed that it was their duty to find for defendants, if the proof satisfied them that there was fraud or mistake in any part of the will.

The counsel of defendants requested the court to charge eight distinct propositions, as the law, which were presented in writing, and all set forth in the record. The court declined so charging, on the ground that so far as they were considered to be correct, and applicable to the case, they were embraced in his general instructions already given. Without going into detail, it is enough to say that we think his honor committed no error in this. Some of the propositions are law, but they had been sufficiently charged. Others are equally true, but had no application to the case made out to the jury, by the proof; and others again embraced principles of law that would be correct in fixing a construction of the will, before a proper tribunal, but had no application on an issue of *devisavit vel non* in a court of probate.

Again, we would not feel authorized to grant a new trial in this case, even if we thought the court had erred in not distinctly charging the jury that they might find against the will, as to some particular clauses, and sustain it as to others, because we see that there is no evidence in this record, that could have produced such a verdict, on any correct application of the law. There is no evidence to sustain a different verdict, and the issue was such as to let in all the legal proof that could be adduced by the parties, and the charge such as to give it its full force and effect.

But in the last place, it is argued that the court erred in excluding legal evidence, which, if admitted, would have produced a different result, or might have done so. If this be so, a new trial should be granted,

[*Harrison et als. vs. Morton & Brown, ex'rs., &c.*]

as we cannot weigh excluded evidence, if competent, and determine what effect it would have had upon the jury. The evidence rejected was of this character: Did not the testator say before the making of the will, that he intended to include the children of his two deceased daughters, his grand-children, equally with his own children, in the bequests of all his property, after providing for his wife? Did he not say this down to the day of making his will, and afterwards, till his death? Did he not say after he made it, that if it were not thus written, it was not his will, and he would alter it if it were not so? &c. &c.

Now all this was properly excluded, and is not legitimate proof to show mistake or omission. If such proof were allowed, it is easy to see that any will might be altered, revoked or annulled by verbal evidence, which would be in conflict with our statutes of wills, and of frauds, and the rules of evidence founded in the experience and wisdom of ages, for the preservation of writings from alteration or change, by the proof of facts, resting in the frail memory of man. Such a rule would open a door for frauds and perjuries of the most alarming character, and render insecure all the rights of man. On this branch of the case, it is unnecessary to do more than to refer to the case of *Weatherhead vs. Sewell et als.*, 9 Humph., 272, and the authorities there cited by the court. In that case, it was proposed to prove, that the testator said a few minutes before the draftsman commenced writing the will, that it was his purpose to give a small tract of land to his daughters, and the whole of his estate besides, to his sons, and the writer, instead of the word "sons," inserted the word "children," by which the

[Harrison *et al.* vs. Morton & Brown, *ex'rs.*, &c.]

daughters were included. The witness also proved, that at the same time, he said his only object in making his will was to provide something for his daughters, as they were then excluded by law, as to his land, it being previous to the act of 1790, and the provision was to give them a "small tract of land." But this proof was ruled to be illegal, and improperly admitted by the circuit judge. And in that case, the will had not been read to the testator, after it was written, but he signed it, being at the time of sound mind, though in a few hours of his death. In the case now before us, it was distinctly and correctly read over once, twice or three times before it was signed, as proved by the witnesses.

Upon these facts, the court very correctly charged, that even if it had been written contrary to his intentions, as declared previously and subsequently, the presumption would be conclusive of a change of purpose and satisfaction with the will as it was written, if correctly read to him. In a case where the will is not written by a legatee, it is a presumption of law, if the testator is of sane mind, that he correctly understands the paper he signs; and much more so, if it is also proved that it was correctly read to him. This presumption cannot be overthrown by oral evidence of declarations made before or after. What has thus been written and signed, is the best evidence of his intentions, and cannot thus be shaken. In the celebrated case of *The Earl of Newburgh vs. The Countess of Newburgh*, 5 Madd., 364, cited and approved by this court in the case of *Weatherhead vs. Sewell*, the rule is thus laid down: "Parol evidence is not admissible to supply any clause or word which may have been inad-

[Harrison *et als.* vs. Morton & Brown, *ex'rs.*, &c.]

vertently omitted by the person drawing or copying the will."

There was no proof offered in the case before us, to show that at the time the will was written, any thing was inserted against the directions of testator, or omitted that he directed to be inserted, by mistake, inadvertence or accident. What effect such proof as that would have, if made in a case like this, where the will was read over before signing and approval; or even when it was barely signed by a competent testator, we will leave to be decided when such a case shall arise. That question is not presented in the case now before us. We need say nothing about the effect of fraud in the draftsman, as there is no pretence of that in this case.

We affirm the judgment of the circuit court.

NOTE.—After the delivery of this opinion the attorney for defendants, on a petition for a reconsideration of the case, stated that the plea of the general issue as it is designated, was not offered until the special pleas were stricken out by order of the court, and that its wrong position in the record, produced this misconception, and the judgment of the court is referred to as well as the brief of the opposite counsel for this correction. We have to take the record as it is and decide upon it accordingly. But if this were not so, and the case had been clearly presented by the record, as it is now contended it is or should be, it would not change the result of this opinion. We would be forced to the same conclusion upon the other grounds stated in the opinion.

CARUTHERS.

MORGAN vs. WINSTON.

EVIDENCE. *When a party may except to the testimony of his own witness.* Should a witness, in answering a question, proper in itself, propounded by the party calling him, state matter illegal and not in response to the question, the party calling the witness may except to the testimony, and upon his exception the court should exclude so much of the answer as is improper, from the jury.

NEW TRIAL. *Surprise.* It is no ground for a new trial that the party who has taken the deposition of a witness excepts upon the trial to so much of the deposition as is illegal evidence, though the illegal evidence proceed from the party's own witness, and be in response to a question proper in itself put to the witness by the party. In such case the other party cannot say that he was surprised by the exclusion from the jury of such illegal testimony.

EVIDENCE. *Record of a judgment in a former action.* In an action upon a covenant of warranty of the soundness of a slave, the plaintiff cannot introduce as evidence the record of a judgment recovered against him, because of the unsoundness of the slave, by one to whom he had sold, (subsequent to his own purchase, from defendant,) with warranty of soundness.

This was an action of covenant in the circuit court of Rutherford county. At the March Term, 1852, DAVINSON, Judge, presiding, there was judgment for the defendant and the plaintiff appealed in error.

E. A. KEEBLE, for plaintiff in error, cited, 4 Humph., 22; 10 *Ibid.*, 234; 1 Phil. Ev., 326; 3 *Ib.*, 815, note 569, 817 note 570; 3 Yerg., 403; 1 Greenleaf Ev., § 553.

READY, for defendant in error,* cited, 10 Yerg., 345; 10 Humph., 234; 1 Greenl. Ev., §§ 527, 538-9.

TOTTEN, J., delivered the opinion of the court.

The action is covenant on a warranty of the soundness of a slave, sold by Morgan, the defendant, to Winston, the plaintiff. There was judgment for the plaintiff, and defendant appealed in error.

[Morgan vs. Winston.]

1. The plaintiff took the deposition of Harris Hill, and asked the witness to state the appearance and condition of the slave; answer; "a short time before her death her flesh wasted away very rapidly," &c., "she had such symptoms as I believe persons generally have, who die of secondary syphilis, which I suppose to be her disease." At the trial, the plaintiff moved the court to strike this latter clause from the deposition, before it was submitted to the jury, which was done and defendant excepted.

In this, there was no error. The evidence was illegal in itself, being a mere opinion of a non-professional witness. The illegality was not waived by the plaintiff, because it was no answer to his question. The question was proper, and a witness will not be permitted, in answer to a legal question, to state what is illegal as evidence, to the prejudice of the party that calls him, and not in answer to his question. In such case, the party is not bound or precluded by the answer, and may himself object to its competency, though the person be his own witness. It may be otherwise, if he ask a question, that is illegal, and it be answered by the witness without objection, for that is a waiver of any objection.

2. The defendant moved the court for a new trial, to enable him to procure the evidence of the said witness, stating that as it was taken by the plaintiff, he considered it as evidence in the cause, and was surprised, and deprived of it, by the action of the court in striking it out.

This was no cause of surprise. The defendant was bound to know that the evidence, in its present form, was illegal, and that it was in the power of the plaintiff to exclude it.

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3. The plaintiff, after he purchased said slave, sold her with warranty of soundness, to Harris Hill, who sued him and recovered damages on that warranty. At the trial in the present case, the plaintiff offered the record of that recovery, in evidence, and it was admitted, as the judge stated to the jury, "as a collateral fact, but not to influence their verdict." The jury, however, included in their verdict, a part of the costs of that suit, which the plaintiff afterwards remitted. To the admission of this record, the defendant excepted, and now insists that it was error.

The general rule is, that a verdict or judgment in a former action, upon the same matter directly in question, is evidence for or against privies in estate, as well as for or against parties to the suit; 1 Phil., on Ev., 324; but not against a stranger, who had no right to examine witnesses, or to defend himself, or to appeal against the judgment; 1 Phil. Ev., 326; and persons not having these rights, are regarded as strangers to the suit; 1 Greenl. Ev., § 523.

Now, what is the issue in the present case? It is, whether the slave was sound, or diseased, at the date of the covenant of warranty, October 16, 1847; whereas, the issue in the other suit was, whether the slave was sound at a subsequent time. The issues are not, in substance and effect, the same. It might well be, that the slave was sound at the one time, and unsound at the other. If the *title* had been the issue in each suit, the record in the one, would be evidence in the other, because of the priority of estate, and the identity of the issue.

But it is said, the record was competent to prove a collateral fact; that is, that a recovery had been had

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against the plaintiff on his covenant of warranty. The rule referred to, will not apply in the present case. A collateral fact is not evidence, unless it be connected with a direct fact, material in the case. "Thus, a judgment against a sheriff, for the misconduct of his deputy, is evidence against the latter, of the fact, that the sheriff has been compelled to pay the amount awarded, and for the cause alleged; but it is not evidence of the alleged misconduct of the deputy;" 1 Greenl. Ev., § 536. If, however, such misconduct be otherwise made to appear, then the judgment against the sheriff becomes the measure of his recovery against the deputy; 4 T. R. 590; 2 East., 459; 1 Phil. Ev., 326.

The principle can have no application in the present case. The record in question is not evidence against this defendant, to prove that the slave was unsound at the date of his warranty; nor, that fact appearing by proof *abunde*, is it the measure of damages to which the plaintiff is entitled. For the disease at those different periods of time, may not be the same or continuous; and if it were, the defendant was not notified and required to defend.

'Tis true, the judge says, he admits the record in evidence, "as a collateral fact, but not to influence their verdict." For what purpose, then, was it admitted? We have seen that it was incompetent, either as direct or collateral proof, in the present case. It was admitted as evidence, and yet it was not to influence the verdict. We think it reasonable and fair to suppose, that it must have that effect, though the judge may not so intend. If it was not to influence the verdict, it was not proper to admit it; or being inadvertently admitted, it should have been withdrawn and excluded. But the record was left

[*Foster et al. vs. Jordan et als.*]

with the jury, and in fact did have its effect, to some extent, as we have seen; but to what extent, it is not possible or material to know. It was well calculated to influence the verdict, and having been illegally submitted to them as evidence, the verdict cannot stand.

Reverse the judgment, and remand the cause for a new trial.

Judgment reversed.

FOSTER *et al.* vs. JORDAN *et als.*

EVIDENCE. By the statute laws of Virginia, any widow, possessing slaves, as of the dower of her husband, who removes the slaves beyond the limits of that State, without the consent of the reversioner forfeits "all and every such slave, and all other the dower which she holds of the endowment of her husband's estate unto the person or persons that shall have the reversion thereof." It is held that if the doweress and her daughter (though the daughter be under twenty-one years of age and a feme covert,) who is the reversioner of the estate, together with her husband, remove from the State of Virginia, at the same time and as one family, the consent of the reversioner to the removal of the slaves will be so far presumed as to cast the burden of proving the contrary on the reversioner, or the creditor of the reversioner who seeks a satisfaction of his debt by a sale of the estate, so alleged to have reverted.

ADVERSE POSSESSION. *Slaves.* If several persons living together under the same roof and as one family have a mixed concurrent possession of slaves, the presumption of law is that each holds consistently with his own right, as also with the right of the others, and that the possession is with the right, and this presumption will prevail though it appear that one of the family, who assumes to be the head of the family, should exercise ordinary acts of ownership over the slaves, or calls them "his slaves," or is even permitted by the other members of the family to pledge one of them for his own debt.

This was a bill filed in the chancery court at Nashville for the purpose stated in the opinion. At the

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November Term, 1851, Chancellor BRIEN, presiding, there was a decree for the respondents and the complainants appealed in error.

TRIMBLE, for complainant.

EWING & COOPER and WILLIAMS, for respondents.

McKINNEY, J., delivered the opinion of the court.

Singleton Foster died intestate in the State of Virginia, about the year 1812. The complainant, Sarah Foster, is his widow, and the other complainant, Mary Davis, (wife of Samuel Davis, defendant,) is his only surviving child.

The intestate was possessed, at the time of his death, of six slaves. Two of said slaves were allotted to the widow, a part of her dower interest, under the law of Virginia. The other four slaves were assigned to the three children of the intestate, who were living at the time of his death, and who survived for some years afterwards; but, of whom, two died in Virginia intestate and without issue, prior to the year 1824, before attaining the age of twenty-one years; and the complainants, (the mother and sister,) succeeded as next of kin, to their interests in said slaves.

In 1824, the defendant, Davis, intermarried with the complainant, Mary, in the State of Virginia; and in the same year, said Davis and wife, together with the complainant, Sarah Foster, removed to this State, where they have ever since resided, and lived together as one family. On their removal from Virginia, they brought

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with them the said slaves, the increase of whom, has since been considerable.

Before the filing of this bill, the defendant, Jordan, recovered a judgment against the defendant, Davis, and caused an execution to issue thereon, and to be levied on thirteen of said slaves. This bill was brought to restrain the sale of said slaves, on the ground that they are the joint property of the complainants, and therefore not subject to be levied upon for the satisfaction of the debts of defendant, Davis. The slaves levied upon, are, in part, the same slaves assigned to the widow and children of the intestate, and, in part, the increase of said slaves. On the death of the two children of the intestate, the complainants succeeded, in equal moities, to their interests in said slaves; and no division of said slaves has ever been made between the complainants.

The complainant, Mary Davis, is the owner of her original one third part of said four slaves, and their increase, and one half of the two-third parts of said two deceased children. The complainant, Mary Davis, has also, the reversionary interest in the two slaves allotted to the widow, Sarah Foster; the widow, by the law of Virginia, taking only a life interest in slaves.

Upon this state of facts, had the defendant, Davis, any such interest in said slaves, as was subject to be levied on for the satisfaction of his debts?

First, in respect to the slaves allotted to the complainant, Mrs. Foster, as widow of the intestate, as part of her dower interest. By the statute laws of Virginia, it is declared that, "If any widow possessed of a slave or slaves, as of the dower of the husband, shall remove, or voluntarily permit to be removed, out of the commonwealth, such slave or slaves, or any of their increase,

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without the consent of him or her, in reversion, such widow shall forfeit all and every such slave or slaves, and all other the dower which she holds of the endowment of her husband's estate, unto the person or persons that shall have the reversion thereof." Under this provision, it is argued, for the defendant Jordan, that by the act of removing the slaves allotted to her, to this State, in 1824, the complainant, Mrs. Foster, forfeited all title to said slaves, she having failed to prove, affirmatively, that such removal was with the consent of Davis and wife; and that by such forfeiture, the title instantly and absolutely vested in the defendant, Davis.

We are not aware of the construction put upon this statute by the courts of Virginia, but construing it for ourselves, we differ altogether in opinion with the defendant's counsel, as to its proper construction. We think that the consent of Davis and wife, in whom the reversion was vested, like every other matter of evidence, may be established by presumptive evidence; and, that from the mere fact of their removal as one family, in the absence of all opposing evidence, the consent of Davis and wife, to the removal of the dower slaves, must be presumed to have been given. Such a forfeiture is to be taken strictly. And, the circumstances are certainly sufficient, at all events, to shift the burthen of proof. So, as to demand of the party insisting upon the forfeiture, proof that the consent was not given. This would be so, as against the reversioner himself, we think; and his creditor can stand in no better condition. Nor is there any force in the objection, that Mrs. Davis being at the time of removal a *feme covert*, and under the age of twenty-one years, was incapable of giving consent to the removal.

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If the question to be decided depended alone upon *her* consent, it might well admit of debate, whether, if, in point of fact, her consent to the removal was actually given, she would not be precluded from afterwards insisting upon the forfeiture, notwithstanding her coverture at the time, on the principle that the privileges of infancy or coverture are not to be abused, or to be available for dishonest or fraudulent purposes. But, be this as it may, her husband was capable, in her right, of giving such consent, either expressly or impliedly; and this is an end of the question.

2. It is said the defendant, Davis, acquired a title to said slaves, so far as relates to the interest of Mr. Foster, by operation of the statute of limitations. We do not think so. Living together under the same roof, and as one family, and having a mixed concurrent possession of the slaves, the presumption of law is, that each was holding consistently with his own right, as also with the right of the others, and that the possession was with the right. And, although there is an apparent conflict in the evidence upon the point, yet, the presumption is not overthrown.

The alleged acts of adverse claim and ownership, on the part of Davis, are capable of explanation. Davis being the head of the family, and having the management and control of the labor and services of the slaves, and this, too, with the consent, express or implied, of Mrs. Foster, his exercise of the ordinary acts of ownership over said slaves, or calling them "his slaves," or even pledging one of them for his own debt, with the assent of Mrs. Foster, would not necessarily establish that he was claiming or holding them in hostility to her right. The most that can be said upon this point is, that the

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evidence, on the part of the defendant, Jordan, leaves the question in some doubt; but this doubt, we think, is removed by the testimony on the other side, and the legal presumption applicable to the facts of the case.

3. As respects his wife's interest in said slaves, the marital right of the defendant, Davis, has never yet attached, for the reason that the slaves still remain undivided, and in common between the wife and her mother. The marital right does not attach upon slaves of the wife in such a predicament, as we have repeatedly held; and, therefore, the husband had no interest liable to execution, as against the wife's equity. And with regard to the reversionary interest in the dower slaves, held by Mrs. Foster for life, we have held, in another case, at the present Term, that reversionary interests in slaves are not subject to execution at law.

We think that, upon well settled principles, their rights are sufficiently established to entitle them to the interposition of a court of equity, as sought by their bill; and, therefore, the decree will be affirmed.

JAVAN NELSON *vs.* THE STATE.

CONTINUANCE. Practice. At the first term at which a case stands for trial, either party may continue it upon a general affidavit, but at the second term, whether or not the case was continued at the first term by affidavit, the continuance because of the absence of witnesses, should only be granted upon special affidavit, in which must be disclosed the facts to be proved, as well as the names of the persons by whom they are expected to be proved.

CRIMINAL LAW. Charge of the court to the jury. Upon the trial of a prisoner charged with murder, the court charged the jury in these words: "The jury are not only the judges of the facts in the case, but they are the judges of the law. The court is a witness to them as to what the law is. After the court has stated the law to them, then, if they believe it to be different, they can disregard the opinion of the court. If the judge is against the defendant his judgment can be reversed by the supreme court; if the jury err in favor of the defendant, their judgment is final, and cannot be reversed by the supreme court." There is no error in so charging a jury in a criminal case.

The prisoner was indicted in the circuit court of Franklin county, for murder. At the April Term, 1852, MARCHbanks, Judge, presiding, there was a trial, and verdict of guilty of murder in the second degree, and fixing the period of imprisonment in the Penitentiary, at twenty-one years. A new trial being refused, the prisoner appealed in error.

H. L. TURNER, for prisoner.

ATTORNEY GENERAL, for the State.

CABUTHERS, J., delivered the opinion of the court.

The defendant was indicted and convicted in the circuit court of Franklin county, for murder in the second degree. A motion for a new trial was made and overruled. Appeal to this court.

The first ground urged for a reversal, is, that defendant was refused a continuance to which he was by law

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entitled, and forced into trial. The application for a second continuance was made after the defendant had announced that he was ready for trial, several pannels examined, all his challenges exhausted, and three jury-men elected. The affidavits on which the motion was predicated, stated that several important witnesses, who had been subpoenaed, did not attend, and that he had heard of others, since he had declared himself ready for trial, who had not been summoned; that they were all material for his defense, &c. The names of the witnesses were given in the affidavit, but what he expected to prove by them, was not set forth. There had been but one continuance of the case, and that was obtained alone upon the statutory ground of excitement and prejudice in the community; Act 1827, ch. 30, C. & N., 701. The defendant, by his counsel, insists here, that the rule of practice settled in the case of *The State vs. Morris*, 1 Ten. Rep., 220, that on the first application for a continuance, the defendant is not bound to disclose what his witnesses would swear, entitled him to a continuance, on a general affidavit. That the continuance at the previous term, though upon affidavit, was a right given to defendant by statute, as a substitute for change of venue, which the same act abolished in criminal cases; and for that reason, should not be counted against him on this application, so as to make it necessary to show what he would prove by his witnesses according to this rule. We think otherwise. The only reason upon which such a rule can be founded, is, that at the first term, the accused may not have had sufficient time to ascertain what, and by whom he would be able to prove particular facts; and for that reason, he should not be required to show to the court, what facts

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he expected to prove; or, in the language of the judge, in *The State vs. Morris*, "disclose what his witnesses would swear," but should be entitled to one continuance, on an affidavit, otherwise sufficient, without stating what they would prove. This reason will apply with equal force to a continuance, at the second term, though it be the first, as well as upon a second continuance. Public policy, as well as individual interests, requires "that justice should be administered without delay," so far as it can be done consistently with the allowance of a reasonable opportunity, for that preparation, which is necessary in each particular case, for the attainment of justice. This sentiment applies to both civil and criminal cases, and we think that its application to practice would forbid a continuance after the first term at which a case stands for trial, without setting forth the facts expected to be proved, that the court may judge of their materiality. Then we would lay down the proper rule of practice, in all cases, to be, that at the first term at which a case, either civil or criminal, is triable by the rules of law, either party may continue upon a general affidavit; but at the second, or any subsequent term, whether the party making the application has continued the case before or not, the affidavit must be special; that is, disclose the facts to be proved, as well as the names of the persons by whom they expect to prove them. While on the one hand, it might work injustice to a party to force him to trial unprepared, on the other, it may be ruinous to the other party, and perhaps to both, to protract unsuccessfully the litigation. At all events, it should be required by any party asking for delay, after he has had at least four months to investigate his case, and prepare for trial, not to produce further delay for the

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want of witnesses, without disclosing to the court what they are to prove, so that the judge may see whether the matter is pertinent or material to the issue. He asks that the law, fixing a certain time or term for his trial, shall be suspended in his favor, and should not complain, that he is required to show clearly that justice requires it, as one of the terms on which the favor is granted. It may appear to the judge, when he states the facts, that they would be of no avail to him, and then it would be an injury to him to grant the postponement, by an unnecessary accumulation of cost, and a great wrong to the other side by the delay. But, under the circumstances of this case, we could not say that the circuit judge was in error, even if the trial had been at the first term; and, therefore, that no continuance had been previously asked or obtained. Though it may not have been so intended in this case, yet, a general rule, permitting it, would place it in the power of a defendant to make an experiment, at the expense of several days of the public time in getting a jury, and then, finding that they did not suit his case, resort to an application to continue, for that reason alone. Though we will not say that a case might not possibly occur, to authorize it, in the discretion of a circuit judge, to save the time that might be consumed in an investigation of the case, where it would be manifest that a sufficient ground could be laid for a new trial, after conviction. But certainly, it would require an exceedingly strong case. We do not say that a case could not be made out to justify it, after a portion of the jury had been selected. We give no opinion on that point; all that is necessary to decide now, is, that no such case is made out here.

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It has often been decided by this court, that continuances are, and should be left, very much to the discretion of the circuit Judge, and we now say that it would require a very strong case of abuse of this discretion, to authorise this court to interfere.

It is urged that there is an error in that part of the charge of the court, which is in these words: "The jury are not only the judges of the facts in the case, but they are the judges of the law. The court is a witness to them, as to what the law is; after the court has stated the law to them, then, if they believe it to be different, they can disregard the opinion of the court. If the judge is against the defendant, his judgment can be reversed by the supreme court; if the jury errs in favor of the defendant their judgment is final, and can not be reversed in the supreme court."

It is first objected that the judge said he was a "witness to them, as to what the law is." This, it is said, was calculated to give undue weight to his opinions of what the law is, conveying the idea that it would be perjury in him to mistake it. Even on that idea, the charge is correct, for he performs this, as well as all other duties of his office, under oath, and is thus solemnly bound to give the law to the jury, fully and fairly, as he understands it. But, in the same sentence, he tells them, that if they differ with him, as to what the law is, they have a right to disregard his opinion. In connection with this last point, which we think quite strong enough, to say the least of it, for the defendant, he reminds them, that if he errs against the defendant, it can be cured by a revising court; but if the jury err in favor of the defendant, there is no means of correcting it, as the State cannot appeal from a verdict

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of acquittal. We can see no impropriety in this remark, as it was a correct declaration of the law, and only tended to put the jury on their guard, in exercising their right as judges of the law, against doing wrong either way.

We have examined the whole charge, and consider it a very able and accurate exposition of the law of homicide, and taken as a whole, we think there is no material error in it. It gave to the defendant the advantage of every legal principle which could operate in his favor, and properly guarded the cause of public justice.

Upon the whole, we feel constrained in all things, to affirm the judgment below.

CHILDRESS vs. HURT.

SALE OF LAND. *By decree of the chancery court. When the sale is perfected.* The sale of land by the Master, under a decree of the chancery court is not complete until confirmation of his report of the sale.

SAME. *When the biddings may be opened.* Until confirmation of the report of the Master, a sale of land, made by him in obedience to a decree of the court, not being complete, it is competent for the court, upon the petition of a creditor of him whose land has been sold for the satisfaction of a debt, to open the biddings, if the sale be attended by such circumstances as satisfy the court that the property sold for a price greatly inadequate to its value, and was purchased with a view to favor the debtor, and the petitioning creditor will agree to advance upon the amount bid, such sum as may, in the estimation of the court, authorise, under the peculiar circumstances of the case, the biddings to be opened. No specific rule as to the sum to be advanced can be adopted, as each application, must depend, in this respect, in a great measure, upon its peculiar facts.

[Childress vs. Hurt.]

This was a petition presented to the chancery court at Nashville stating the facts and for the purpose mentioned in the opinion. At the November Term, 1851, Chancellor BRIEN, presiding, there was a decree for the respondent and the petitioner appealed.

EWING & COOPER, for petitioner.

TERMBLE and MEIGS, for respondent.

McKINNEY, J., delivered the opinion of the court.

We are of opinion that the application of the petitioner, Childress, to have the biddings opened, and the premises resold, ought to have been allowed. The petition, for that purpose, was presented to the first term of the court after the sale, and before confirmation of the master's report of sale. The facts of the case are these: On the 3d of May, 1851, the property known as "Odd Fellows' Hall," situate in Nashville, was sold under a decree of the chancery court, upon a bill brought to enforce a mechanic's lien existing in favor of G. W. Smith, upon said property. At said sale, the defendant, Hurt, became the purchaser at the price of nine thousand five hundred dollars, for which he executed his notes to the master, payable at one and two years, pursuant to the terms of sale.

At the time of said sale, the petitioner, Childress, was the judgment creditor of the corporation, known as the "Independent Order of Odd Fellows," to the amount of about two thousand dollars. Previously to said sale, executions had been issued on said judgment, and were returned *nulla bona*; and it appears that

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"Odd Fellows' Hall" was the only corporate property belonging to said institution.

The petitioner offered to advance two thousand eight hundred dollars on the sum for which said property was bid off, by the defendant, Hurt, being about *thirty* per cent., and offers in his petition either to execute his obligations for twelve thousand three hundred and fifty dollars, and take said property, or that the biddings be opened at the minimum price of twelve thousand three hundred and fifty dollars, which he agrees to offer. The petition charges that the purchase, though ostensibly for the private and individual benefit of the defendant, Hurt, was in reality, for the benefit of the "Order of Odd Fellows," and was the result of a scheme to protect the property against the creditors of the latter.

The defendant, in his answer to the petition, denies that he purchased said property for the "Lodge," says he made the bid in his individual capacity, without instructions or authority from the Grand Lodge; "that he is a member of said Lodge, and feels an interest in the welfare of the order, and is willing to admit, that it is his intention to permit said Grand Lodge to repurchase said house and lot, but he denies that he has executed any paper or instrument binding him to do so."

The chancellor upon the foregoing facts, refused to open the biddings, and confirmed the master's report of purchase.

The exercise of the power of allowing the biddings to be opened, and ordering the premises to be resold, must necessarily, in some degree, depend upon the circumstances of the particular case in which the application

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is made; yet there are certain established principles, by which the discretion of the court must be regulated. The course of decision upon this subject, in our courts has conformed rather to the English practice, than to that of some of the American courts.

In 4 Kent's Com., 192, it is laid down, that a "sale at public auction, by the master, is ordinarily a valid and binding contract, as soon as the hammer is down," and that the purchaser, by force of such sale, becomes entitled to a conveyance "unless there be found mistake or some special circumstances, affording, as in other cases, a ground for equitable relief." The English doctrine, on the other hand, seems to be, that although in ordinary sales by auction, or by private agreement, the contract is complete when the agreement is concluded, a different rule prevails in chancery sales by a master. In such cases, the purchaser is not considered as entitled to the benefit of his purchase, till the master's report of the purchaser's bidding is absolutely confirmed by the court; until confirmation of the report, the contract is not regarded as complete, or binding. And this rule applies equally to cases in which it is sought to compel a purchaser to complete his purchase, as where the latter seeks to enforce the contract; 2 Daniell's Ch. Pr., 1454, 1460; 1 Sudg. on Vend., 58; 2 U. S. Dig., 338. Until confirmation of the report, the purchaser is not compelled to complete his purchase; nor is he entitled to a conveyance; nor to be let into possession of the estate; neither is he liable to any loss or injury by fire, or otherwise, which may happen to the estate in the interim; 2 Daniell's Ch. Pr., 1455, and cases referred to in notes. And so, until confirmation of the report, the purchaser may be discharged from

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his purchase, on the ground that a good title cannot be made, or of mistake, or other sufficient cause; *Ib.*, 1452, 1463.

The principle being admitted, that a sale by the master, is not complete, nor binding on the purchaser, till confirmation of the report; and this principle has been repeatedly sanctioned and applied by this court. See 11 Humph., 278, and cases there cited. The conclusion is easily arrived at, that, as it is equally the object and duty of the court to see, not merely that the sale is properly conducted, but also that the property shall be sold for the best price that can be had, it is allowable to open the biddings, alone upon the ground of the offer of a larger price, if the advance be so considerable, as to furnish a sufficient inducement, under all the circumstances, to a resale of the property; 10 Humph., 275; 2 Daniell's Ch. Pr. 1485.

With respect to the advance which ought to be deemed sufficient to require that the biddings should be opened, no very definite rule can be laid down; this must be left to depend, in some measure, on the circumstances of the given case. In the English practice, ten per cent. was formerly considered to be sufficient on a large sum. Lord Eldon thought that this was not a wise rule to establish; 7 Ves., 420. The rule has fluctuated, and in some cases, the biddings have been opened upon a less advance than ten per cent.; 5 Ves., 655; 2 Ross, 606. Without attempting to prescribe any uniform rule upon this subject, we think it sufficient to say, in the decision of the case under consideration, that under the circumstances, the advance offered, of thirty per cent., was sufficient to require the biddings to be opened.

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In coming to this conclusion, we are not left to rest our judgment alone upon the fact of an *advanced bid*. The circumstances of the case, almost force the conclusion upon the mind, that the purchase was not made by the defendant for his own individual use or benefit; the character of the property itself forbids such an idea; and to allow him to hold the property, and that too, at a price so greatly inadequate to its fair value, would be unjust towards the creditor's of the "Lodge," while on the other hand, in refusing him the benefit of a purchase, not in reality made for himself, and from which, personally, he neither expected or desired to derive benefit; and which, if permitted to stand, would enable him to aid the "Lodge" in defeating the rights of creditors of the latter, no injustice, or injury, of which he can justly complain, will be done to him. It is no objection, that the person seeking to open the biddings, is a stranger to the proceeding in which the sale took place; or that he has no interest in the subject matter of the sale. It is well settled, in England, that any person who is capable of becoming the purchaser, may make this application to the court; 2 Smith's Ch. Pr., 238; 2 Dan. Ch. Pr., 1465. This ought to be so, because it can be a matter of no consequence who the person may be, offering to take the estate at an advanced price; and in this view, it is settled, that the biddings may be opened on the application of a person who was actually present at the sale, and might have become the purchaser at such sale. The only difference in such case, according to some of the authorities, is that from a person who attended the sale, a larger advance might be required to induce the court to open the biddings at his instance; *Ib.*

[The State vs. Chaffin.]

The decree of the chancellor, confirming the master's report of sale, and dismissing the petitioner's application, will be reversed; and the biddings will be opened at the minimum price of twelve thousand three hundred and fifty dollars; the petitioner first entering into bond with sufficient security, to the clerk of this court, for the payment of that sum.

THE STATE vs. CHAFFIN.

ASSAULT AND BATTERY. *Former conviction.* If a party be charged with an assault, and convicted thereof, he cannot afterwards be punished for the battery committed at the same time.

The defendant was arraigned before a Justice of the Peace under the "small offense law," and fined for the commission of an "assault," as charged in the warrant. Subsequently he was indicted in the circuit court for an assault and battery, to which indictment he pleaded the former conviction of the assault. To this plea the Attorney General demurred, and the demurrer being overruled and judgment rendered for the defendant, the Attorney General, *pro tem.*, KERCHEVAL, in behalf of the State, appealed in error.

ATTORNEY GENERAL, for the State.

BRIGHT, for the defendant in error.

[Hooper, for the use of Given, vs. Spicer.]

TOTTEN, J., delivered the opinion of the court.

The defendant was indicted for an assault and battery upon the person of Daniel Holman. He pleaded in bar a former conviction before a Justice of the Peace, under the "small offense law." The warrant before the justice is for an *assault*, but the plea avers that it is for the same offense as that alleged in the indictment.

The battery includes the assault, and for the assault the defendant has received the legal punishment. He cannot now be punished for the battery, because it cannot be separated from the assault. The one is a necessary part of the other, and if he be now punished for the battery, he will thereby be twice punished for the assault; that is, be twice punished for the same offense, which, of course, cannot be done.

Let the judgment be affirmed.

HOOPER, for the use of Given, vs. SPICER.

SET-OFF. *Mutual demands.* The defendant, in an action of debt brought by an endorsee against him, upon a promissory note which has been several times endorsed, when over due, cannot set-off a claim which he has against one of those through whom the note passed to the plaintiff, though he had the claim at the time the note upon which he is sued was in the hands of his debtor as an endorsee thereof.

The facts of this case are fully stated in the opinion. The judgment from which the plaintiff appealed in error,

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was rendered at the July Term, 1852, of the circuit court for Humphreys county, PEPPER, Judge, presiding.

ROBB and BAILEY, for plaintiff in error.

TOTTEN, J., delivered the opinion of the court.

This action, in debt, commenced before a Justice, came into the circuit court of Humphreys, on plaintiff's appeal; when, on a trial *de novo*, judgment was rendered for defendant, and the plaintiff appealed in error to this court.

The case presents a question of set-off. The action is founded upon a note, executed by defendant, to Isaac Hooper, for fifty dollars, due December 25th, 1846. It was endorsed by the payee to one J. Adams, by him to N. Hooper, and by him to A. Given, the *cestui que use* in this suit, who struck out the endorsements and sued in name of the payee, for his own use.

The defendant is the payee and holder of a note on said J. Adams, for sixty-five dollars, due May 5th, 1846, and held this note whilst Adams, as endorser, was holder of the first named note, which was then over due. Adams left the county, perhaps insolvent, and now the defendant insists upon his note as a set-off against the plaintiff's demand.

His honor, the judge, was of opinion that it was a valid set-off, and so, in effect, instructed the jury; and the argument to be inferred from the charge is, that when said Adams was the holder and owner of the note on defendant, he was also indebted to defendant by the other note, and the *one* was a valid set-off against the other; and, therefore, when Adams transferred the note on defen-

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dant, it being over due, the holder, and all subsequent holders, though for value, and without notice of the set-off, took the note subject to defendant's equitable right of set-off. We consider that this opinion of his honor, was erroneous.

Set-off is in the nature of a cross action, and is allowed in a case of mutual debts, in the same right subsisting at the commencement of the litigation; Act 1756, ch. 4, § 7; *Keith vs. Smith*, 1 Swan's R., 92.

Now, here the debts are not *mutual*, and that is a fatal objection to the set-off. 'Tis true that if Adams were plaintiff, the set-off would be good; for, in that case, the debts would be mutual. But when Adams transferred the note, the debts were no longer mutual, and the right to the set-off continued no longer; for, how could defendant bring a cross action against Given, on the note against Adams, for which Given was in no respect liable? 'Tis true, that as the note on defendant came to Given after it fell due, Given takes it subject to any legal defence that may be made against it, as that it is void for fraud or other sufficient cause; or that it has been paid. But the plea of set-off does not impeach the note; on the contrary, it is an admission that the note is valid, and remains unpaid, and a party pleading it merely insists, that he, too, is entitled to a recovery against the plaintiff, and that the one recovery be set off against the other. Certainly it cannot be said that Given took the note subject to a cross action and recovery against himself, for the debts of another person, for which he is in no wise bound. We may further observe, in this connection, that a matter of set-off is not necessarily connected with the plaintiff's demand, as a payment is; but the defendant may, instead of a cross action, bring a sep-

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arate and independent action on his demand. We say nothing in the present case, as to the effect of a fraudulent assignment by an insolvent party, made with intent to defeat the equitable right of set-off, for it is conceded that Given is a *bona fide* holder for value.

Let the judgment be reversed, and the cause be remanded for a new trial.

Judgment reversed.

HORD vs. NASHVILLE & CHATTANOOGA RAIL ROAD COMPANY.

PRACTICE. *Construction of charter of Nashville & Chattanooga Rail Road Company.* The provisions of the charter of the Nashville & Chattanooga rail road company, which are intended to regulate the practice of the courts, in assessing the value of land taken for the use of the road, do not authorise, upon the "appeal" of either party from the report of the five commissioners, another valuation to be made, *upon a view of the premises*, by a jury of twelve persons. The jury can only make the valuation upon proof heard by them, under the direction of the court, as in all other cases.

This was a proceeding in the circuit court of Rutherford county, of the character stated in the opinion. At the March Term, 1852, TURNER, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

MILES and H. P. KEEBLE, for plaintiff in error.

E. A. KEEBLE, for defendant in error.

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TOTTEN, J., delivered the opinion of the court.

The plaintiff and defendant not being able to agree upon the value of a right of way for the construction and use of defendant's rail road over the plaintiff's land; five *commissioners* were appointed by the circuit court, to assess the same, or to assess the plaintiff's damages in that behalf. The commissioners reported the plaintiff's damages at twelve hundred dollars; the defendant excepted to, and "*appealed*" from the report to the circuit court, and thereon the court ordered a new valuation to be made by a *jury* of twelve persons, appointed by the court, who, *upon view of the premises*, assessed and reported the damages at fifteen hundred dollars.

The defendant excepted, also, to this report, and moved for a new trial to be had before a jury in court; and the plaintiff moved for judgment on the report, which was refused, and a new trial granted. To the action of the court, in refusing to render judgment on the report, the plaintiff excepted, and appealed in error to this court.

This proceeding is under the twenty-fourth section of defendant's charter; act 1845, ch. 1.

In constructing this statute, we observe, that if the parties cannot agree upon the value of the right of way, the subject is placed under the control and jurisdiction of the circuit court. The court shall appoint five commissioners, who, *upon view of the premises*, may assess the damages, and report the same to the court. Either party may, however, except to, or appeal from this report, to the next term of the circuit court, giving reasonable notice thereof. Thereon, the "court shall

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order a new valuation to be made by a jury, who shall be charged therewith, in the same term, or as soon as practicable, and their verdict shall be final, and conclusive, between the parties, unless a new trial shall be granted."

It is argued, that the jury provided for, may make the valuation, *upon view of the premises*, and that their verdict thereon, is in accordance with the intention of the statutes. There is certainly some reason for this construction, but we think it not the true one, and that in practice, it would prove to be highly inconvenient. The valuation is to be by a "*jury, whose verdict shall be final, unless a new trial be granted.*" These expressions, used in the act, are inconsistent with the idea of an assessment made upon view of the premises; as in case of the commissioners before provided for.

The verdict of the jury, is to be made upon legal evidence and legal principles. If the court deem it erroneous for any cause, it may be set aside and a new trial granted. Such proceeding can only be had before the court, under its immediate inspection and control. For how is this court to know, upon a motion for a new trial, whether the verdict is warranted by the proof, when it is founded, in whole, or in part, upon a view of the premises? How is a jury, not before the court, to be instructed as to the legal principles that should govern them, in making up their verdict? And in case of error, committed by the jury, or court, how can the case be stated in a bill of exceptions, for review before this court? The rule by which the valuation should be made, and the practice under it, should be uniform and permanent. We have had occasion to consider the rule by which the valuation, of damages,

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shall be governed, in another case, decided at the present term. It is the province and duty of the circuit judge, to enforce this rule upon the jury, and to see that it has its proper influence and control over their verdict. It seems to us, that this can only be done when their verdict is made, not upon *view*, but upon evidence, as in other cases. Such, we think, is the proper practice, under this statute.

The result is, that there was no error in the refusal of the court, to render judgment upon the verdict, it being founded erroneously, upon a view of the premises. The action of the court, in that respect, is affirmed, and the cause is remanded to be tried by a jury, upon evidence, before the court, as in other cases.

Judgment affirmed.

CARNAHAN vs. WOOD.

EVIDENCE. *Declarations of one not a party to the action.* While it is true as a general rule that the declarations of a person made after he has parted with his interest in the subject matter of litigation cannot be received to disparage the title or right of a party acquired in good faith, previous to the time of making such declarations, still this principle is inapplicable to cases of fraudulent sales of property.

SAME. *Same.* The declarations of one who is not a party to the suit but who has had the actual possession of slaves (the right to which is the subject matter of the litigation) may, in connection with his acts of ownership, be admitted to show the character of his possession; whether or not it has been such as to vest a title in him by reason of a continued adverse possession for three years.

This was an action of replevin in the circuit court of Rutherford county. At the November Term, 1852,

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DAVIDSON, Judge, presiding, there was judgment for the plaintiff and the defendant appealed in error.

E. A. & H. P. KEEBLE, for plaintiff in error.

READY, AVENT and PALMER, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This was an action of replevin in the circuit court of Rutherford, instituted by Wood against Carnahan, for the recovery of a negro girl named Milly, seized by the latter, as an officer, as the property of Robert Wood, the father of the plaintiff in this action, for the satisfaction of certain executions in his hands against said Robert Wood. The plaintiff recovered the slave in the court below, and the defendant appealed in error to this court.

The facts of the case, material to be noticed, are these: on the first day of February, 1843, Robert Wood, a resident of Rutherford county, sold and conveyed the slave in question, together with another slave, to his son, Thomas J. Wood, who resided at the time in Bedford county. The latter immediately took said slaves home, and retained possession of the girl, Milly, until the 28th of December, 1843, when he sold and conveyed her to his brother, Robert H. Wood, the plaintiff in this action. The latter, at the time of his purchase, resided in his father's family in Rutherford county, and immediately brought the slave to his father's house, where she remained until her seizure by the defendant, on the — day of — 1850. In 1845, the plaintiff married; but, on leaving his father's house,

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he left the slave, Milly, to remain with the family. The proof shows, that the motive of the plaintiff in taking said slave to his father's, and in leaving her with the family, was to wait on, and attend to his mother, who was enfeebled by disease, and so continued to be, until her death, which happened not long before the seizure of said slave by the defendant. The proof, on the part of the plaintiff, also shows that there was no other servant in the family during all the time that the girl, Milly, remained there, and that during all that period, said slave was held and recognized by Robert Wood, as well as by the other members of the family, as the exclusive property of the plaintiff.

The proof on the part of the defendant, shows, that at the date of the sale of the two slaves by Robert Wood, to Thos. J. Wood, there were several unsatisfied judgments then existing against the former, which still, in part, remain unsatisfied. The defendant, on the trial of the cause, proposed to give in evidence to the jury, the declarations of Robert Wood, made in the absence of the plaintiff, but while said slave was in possession of said Robert Wood, and at the time of the seizure by the defendant, to the effect, that he had offered to sell said girl, Milly. The court refused to admit such declarations, and whether or not this was error, is, perhaps, the only question necessary to be decided in the case.

It is true, in general, that the declaration of a party, made after he has parted with his interest in the subject matter of litigation, cannot be received to disparage the title or right of a party, acquired in good faith previous to the time of making such declaration. But, this very just and reasonable principle must be taken as inapplica-

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ble to cases of fraudulent sales of property. If, for example, a conveyance is made, absolute upon its face, and the vendor continues to retain the possession of the property as before, this being *prima facie* evidence of fraud, a creditor impeaching such conveyance on the ground of fraud, may be admitted to prove the declarations of the vendor, thus retaining the possession, in relation to the ownership, or to the character of his possession of the property. The fraudulent conveyance, though valid as between the parties, is void as to creditors of the vendor. So far as relates to them, the right of property remains unchanged in the vendor. And his declarations are regarded as admissible, from his relation to the property, as part of the *res gestæ*. Such admissions may be proved by any person who may have heard them, because the question is merely, whether a particular admission was made, and not whether the fact be as declared by the party. The admission, therefore, cannot be regarded as hearsay, but as original evidence.

Again: as a title to slaves may be acquired by an adverse possession of three years, the declarations of the party having actual possession, in connection with his acts of ownership, are admissible to show the character of his possession.

In the present case, if, as is alleged, the slave was placed in the possession of Robert Wood, for the purpose of ministering to the comfort and necessities of an afflicted parent, the conduct of the plaintiff, in doing so, was not only blameless, but praiseworthy, and his rights will not be prejudiced thereby. In this view, the possession of the slave by the father, and his control over her, would not be inconsistent with the plaintiff's right, and would be presumed to be subordinate to his title,

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until the contrary was clearly established. Nor can the plaintiff's title, if acquired in good faith, be effected by fraud in the sale by Robert Wood, to Thomas J. Wood, if such were the facts.

The result is, that although we regard the proof, on the part of the plaintiff as amply sufficient to support the verdict, yet, upon the ground of the refusal of the court to admit the declarations of Robert Wood, proposed to be proved on the trial, we feel constrained to grant a new trial; whether such declarations can avail the defendant anything upon another trial, is a matter not for our consideration, but for the jury.

Judgment reversed.

THE STATE *vs.* CRUTCHER'S *Adm'r.*

LIMITATION OF ACTIONS. *Executors and administrators. Actions brought by the State.* The statutes which limit the time within which suits may be brought against executors and administrators, operate as well against the State as against individual citizens; this conclusion is predicated upon a construction of the Acts of 1840, ch. 139, 1715, ch. 48, § 9, and 1789, ch. 23, § 4.

ESTOPPEL. *The State bound by the acts of its public agents.* A final settlement, made by a public officer of the State with another officer who is supposed to be in default, which is made in pursuance of a statute, and which received the approval of the Legislature, estops the State afterwards to disregard the settlement and sue for monies alleged to have been due before the settlement.

This bill was filed in the chancery court at Nashville upon the facts and for the purpose stated in the opinion. At the November Term, 1852, chancellor BRIEN presiding.

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there was a decree ordering the account prayed for in the bill, and the respondent appealed.

HOUSTON and JNO. A. McCAMPBELL, for complainant, argued: There is no provision in our statute of limitations, or in the Act of 1715, ch. 48, § 9, passed for the benefit of dead men's estates, including the State, either express or implied. "And it may be laid down," says Mr. Justice Story, "as a safe proposition, that no statute of limitations has been held to apply to actions brought by the Crown, unless there has been an express provision, including it." The rule is, where a statute is general, and thereby any prerogative, right, title or interest, is divested or taken from the King, the King is not bound, unless the statute is made by express words to extend to him; Angel on Lim., 336; *U. States vs. Hoar*, 2 Mason's R., 312.

The same principle prevails in this country, and it is equally well settled "that no laches is to be imputed to the government, and against it, no time runs so as to bar its rights;" Angel on Lim., 369 to 372; *Inhabitants of Stoughton vs. Baker*, 4 Mass. Rep., 528; *Weatherhead vs. Blodoe*, 2 Tenn. R., 352; *Nemo's ex'r. vs. The Commonwealth*, 4 Hen. & Munf., 53; *People vs. Gilbert*, 18 John., 228; *Johnston vs. Irwin*, 3 S. & Rawle R., 291.

The reason of this *principle* or *maxim*, it has been thought, is the great public policy of preserving the public rights, revenues and property, from injury and loss by the negligence of public officers. And the prerogative right of the King in relation to acts of limitation in England, is, in fact, nothing more than a reservation or exception, introduced for the public benefit, and is equally applicable to all governments; 2 Mason's R. 314; An-

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gel Lim., 368; see also 20 John., 472; 16 S. & R., 245; 1 Watts, 54; 4 Bibb, 62; 10 Wend., 363; 4 Scam., 404.

In England, it is held that the King is not bound by the statutes of limitation; that no laches can be imputed to him; and whenever it occurs, he may rely upon his privilege, "*quod nullum tempus occurrit regi.*" The reason of the rule is founded on the presumption that the King is employed in the affairs of government, and ought not to suffer by the negligence of his officers. In a representative government, where the people do not and cannot legally act in a body, where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally strong; 18 John., 228.

The settlement may be opened and examined; Sto. Eq., § 523.

F. B. FOGG and EWING & COOPER, for respondent.

McKENNEY, J., delivered the opinion of the court.

This is a bill filed on behalf of the State, by the Attorney General of the sixth judicial circuit, under the act of 1840, ch. 189, to recover from the administrator of Thomas Crutcher, deceased, formerly Treasurer of the middle division of the State, about the sum of six thousand dollars, on account of various sums of money, received by the intestate, as Treasurer, and not accounted for in any of his settlements. The several items composing said sum, are specifically set forth in the bill, and are alleged to have been received between the years of 1829, and 1835. The bill is based upon a statement made out by the Comptroller of the treasury,

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on the 19th of January, 1849, pursuant to the act of 1840, showing that the errors and omissions charged in the bill are evidenced "by entries in the treasurer's books, and on executions and receipts," in the handwriting of the said Thomas Crutcher.

The intestate was Treasurer for the period of twenty years, and up to the 1st of March, 1836. Settlements appear to have been made with him, from time to time, by committees of the Legislature. The last settlement of his accounts was made after his retirement from office, by the Comptroller of the Treasury, according to the provisions of act of 1835, ch. 27, § 13.

The answer of the defendant does not admit any of the errors or omissions charged in the bill; relies upon the settlement of the intestate's official accounts; and also relies upon the general statute of limitations, and the statutes passed for the benefit and protection of the estates of deceased persons, in bar of the relief sought by the bill.

The intestate died in the early part of 1844, and this bill was filed on the 11th day of September, 1851; more than *seven years* after his death, and grant of administration upon his estate.

The chancellor, on the hearing of the cause, ordered an account; from which order, by leave of the court, an appeal was prosecuted to this court. The decree of the chancellor assumes, and the argument here, in support of it, maintains, that time does not run against the State; because, as is argued in none of our statutes of limitation, is the State expressly, or by necessary implication, included.

The contrary of this position is asserted by the defendant's counsel, who insist, that by the act of 1840, under

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which this bill was filed, suits brought by the State, are, in all respects, placed upon precisely the same footing as those of individual persons, as to the forms of procedure, the rules of evidence, and principles of law, applicable to the case, under the general law of the land.

We have been referred by the counsel representing the State, to several American cases, which maintain the doctrine, that the policy of the common law rule, which excepts the *crown* from the operation of statutes of limitation, applies with equal force to our system of government. Some of the cases seem to proceed upon the ground, that this principle of the common law was brought with them by our ancestors from England, and incorporated into our jurisprudence; and the reason of this is said to be found in the public policy of securing the public rights and revenues, from injury and loss by the negligence or fraud of public officers. In England, this principle results from the prerogative, or "that special pre-eminence which the king hath, above all other persons, and out of the ordinary course of the common law, in right of his regal dignity;" 1 Bl. Com., 239. The law ascribes to the king, not only the attribute of sovereignty, but of "absolute perfection," also. Hence, as no laches, or negligence, can be imputed, "the king has a prerogative, *quod nullum tempus occurrit regi*, and therefore the general acts of limitation do not extend to him;" 11 Co., 68-74, b. The law intends that the king is always busied for the public good, and therefore has no leisure to assert his right within the time limited to his subjects; 1 Bl. Com., 248.

The American cases referred to, concede, that this principle, so far as it relates to the person and regal

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dignity of the king, can have no application in this country; but that, so far as it is founded upon, and is subservient to the policy of protecting the public against the negligence and fraud of its agents, it is alike applicable here as in England.

If it were important, in the decision of the present case, to enter into a discussion of this subject, it might, perhaps, be doubted, whether this maxim of regal prerogative, was not one of the very things which our ancestors, instead of bringing with them, were most careful to leave behind, as not altogether consistent with the theory of government and jurisprudence maintained, and desired to be adopted by them. And it might no less admit of doubt, whether the notion of public policy, upon which the principle is held applicable in this country, is not based upon an unsound and false theory; the practical tendency of which, would be to discourage, rather than to secure, the prompt and faithful discharge of official duty in public functionaries. But in the case under consideration, it is not necessary to enquire, whether or not the State is within the operation of the general statutes of limitation; and we leave that question open for adjudication, when a decision shall become necessary. We will confine ourselves to the question, for the present, whether or not the statutes, limiting the period within which suits may be brought against the representatives, real, or personal, of deceased persons, form a bar to the present suit. And in considering this question, it may be admitted, that statutes, general in their terms, should be regarded as meant only to regulate the rights, and prescribe a rule of conduct for the citizens. In the language of Mr. Justice Story, "where the government is not expressly, or by

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necessary implication, included, it ought to be clear, from the nature of the mischief to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon the statute ;" *United States vs. Hoar*, 2 Mason's Rep., 311-314.

We proceed then, in the first place, to consider the act of 1840, under the provisions of which this bill was filed. The sixth section enacts, "That the State of Tennessee shall be, and is hereby authorized to commence and prosecute suits for all causes of action accrued or accruing to the State, in all of the courts of the State, *according to the laws of the land, as in other cases.*"

That this statute intended to place the State upon the same footing with other suitors in the courts, can admit of no doubt; it is so, in effect, declared in terms. If this be not so, then the words have no meaning. The claim of right, or "cause of action," sought to be enforced, must be of such a character as, "according to the laws of the land," may be enforced "in other cases." The remedy and the right of the State, on the one hand, are to be regulated and determined according to the law of the land, as in other cases, between individual suitors; and so, on the other hand, precisely the same rule is to govern, as respects the matters of defence of which the defendant may avail himself. Whatever matter would be a valid defence according to the settled principles of law and modes of procedure, in like cases between individuals, will be equally so in suits instituted on behalf of the State, under the act of 1840. The express declaration, that the suits, which the statute authorized to be brought by the State, shall be prosecuted "according to the laws of the land, *as in other cases,*" is comprehen-

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sive of every thing respecting either the right or the remedy; and it clearly excludes the idea of an intention, that the State, as a suitor in the courts, should be permitted to claim or assert anything in the nature of prerogative or exemption, out of the ordinary course of the law of the land, not admissible in similar controversies between private individual suitors.

In this view of the act of 1840, it results, that the present action is barred by the statutes of limitation before referred to; more especially by the act of 1715, ch. 48, § 9. This conclusion is not only greatly strengthened, by looking to the language and object of the act of 1715, but we think the same conclusion must be arrived at, upon a proper construction of the latter act, by its own proper force and meaning, aside from the act of 1840.

The ninth section of that act declares that, "the creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise such creditors shall be forever barred."

This statute in its character, object, and effect, is wholly different from the ordinary statutes of limitation. The term "creditors," it may be remarked, properly includes artificial persons, as bodies politic or corporate, as much as natural persons; and a remarkable feature of the law is, that it contains no exception or saving clause, in favor of the rights of any person whatever. It must therefore, upon the established principle of construction, applicable to statutes of limitation, be taken to run against all persons, and artificial persons, as well as natural. It is a general principle of law, that no *laches*, or negligence, can be

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imputed to a person who is within the age of twenty-one years; and, therefore, in ordinary statutes of limitation, which are designed only to act upon the remedy, there is a saving of the rights of *infants, femes covert, persons non compos, &c.* But it is well settled, that a statute of limitation runs against, and bars the rights of all persons not expressly mentioned and excepted in the statute. Persons not expressly excepted, cannot be exempted by construction; and therefore infants and other persons laboring under disabilities, are embraced by the general words of a statute, if there be no saving clause in their favor; Angell on Lim., ch. 7; 17 Ves., 86.

Now, would it not be most unreasonable, not to say absurd, in the construction of this statute, which, under the general denomination of "creditors," comprehends the State as much as individual citizens, to hold that infants and others who, in law, are deemed positively incapable of understanding or protecting their rights, should be barred; and yet, that the State, or rather its agents and functionaries, should be held exempt from the operation of the bar? Might it not, with reference to this statute, be safely affirmed, that, by necessary implication, the State is included? This is still more conclusively demonstrated, by looking to the reason and object of the law, and its difference, in other respects, from ordinary statutes of limitation. This statute establishes what is called a positive prescription, or limitation, in contradistinction to a negative prescription. The distinction between them is, that the former acts upon, and extinguishes the *right*, the latter only affects the *remedy*. Positive prescription has the effect of putting a final end to all further litigation or controversy; and

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is a means of acquiring a positive right to property, after the lapse of such period as the law has fixed upon, as sufficient for that purpose.

But a statute of limitation, in the nature of a negative prescription, applies not to the right, but merely to the remedy. The debt is not extinguished, nor the right destroyed, as in the former case; and hence, upon the express promise or admission of the debtor, the payment of the debt may be afterwards enforced; Angl. on Lim., ch. 1.

This statute is founded upon just and urgent considerations of public policy. The discouragement of litigation, under circumstances which, in many cases, preclude the attainment of truth or justice; the suppression of frauds and perjuries, in attempts to set up demands against the estates of deceased persons, when the means of exposing their falsity have perished; the necessity that those who succeed to the rights and property of such deceased persons, should be quieted in the enjoyment of their rights. These, and other reasons which might be stated, strongly sustain the policy of the Act of 1715. The period fixed is sufficiently long for all creditors, in the exercise of reasonable diligence, to assert their rights; and they have no just ground of complaint that, after the expiration of the time limited, their rights are declared to be taken away and extinguished; the loss is the consequence of their own *laches*. Does not the policy of the statute apply as much to the State, as the creditor of a deceased person's estate, as to individual creditors? And would it not be in opposition to the soundest public policy, to exempt the State from the operation of this statute, thereby giving a license to negligence on the part of government officers entrusted with the supervision and

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settlement of the official accounts of those whose duty it is to collect and account for the public revenues?

The same reasoning applies, with perhaps equal force, to the Act of 1789, ch. 23, § 4; limiting the periods for bringing suits against the executors or administrators of the estates of deceased persons. The idea that the State is not bound by these statutes, is startling, when we consider the consequences in reference to the administration of insolvent estates under our system; and scarcely less so, as respects solvent estates, after the property of the estate has been disposed of in the payment of debts, or has passed into the hands of innocent purchasers. Against whom, in such case, would the State pursue her remedy, if it existed? But it is unnecessary, upon this point, to say more. Although the right of *sureties*, in the official bonds of government agents, to be discharged in reasonable time from all liability, and other considerations that might be stated, tend to strengthen the conclusion, that, "from the nature of the mischiefs to be redressed, as well as from the language used, the government itself was in contemplation of the legislature," in the enactment of these laws.

There is another ground upon which the State is precluded from maintaining this bill. Thomas Crutcher went out of office on the 1st of March, 1836, nearly sixteen years before this bill was filed; and all the various errors and omissions set forth in the bill, are charged to have occurred prior to that date.

The Comptroller of the treasury, who, in 1836, made a final settlement with said Crutcher, after his retirement from office, pursuant to the act of 1835, ch. 27, § 13, in his report to the succeeding legislature, says, "*The balances which were ascertained to be due from*

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former treasurers, respectively, for monies received and not previously accounted for, were promptly adjusted."

This was the official act of the highest accounting officer of the government; it received the approval of the legislature; and the State, under the circumstances of this case, is concluded by it. That the State is bound by the acts of its public agents, was held by this court in case of the *State vs. Jefferson Turnpike Company*, 3 Humph., 305, and again in the *State vs. Hamilton*, 11 Humph., 47-49.

It follows, that the decree of the chancellor is erroneous, and it is reversed and the bill dismissed.

TOTTEN, J., dissented, upon the point, that the State is barred by the acts of 1715 and 1789, holding the contrary opinion.

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REMAINDER. *Attachment.* An estate in remainder, in real or personal estate, is *property* within the meaning of the act of 1838, ch. 166, § 1, and is subject to attachment for the payment of debts.

ATTACHMENT. A proceeding under the statutes of Tennessee, authorising attachments, may be prosecuted, though the plaintiff in this State, is at the same time, prosecuting a suit in the chancery court of another State, for the purpose of bringing to sale there, property of his debtor, for the satisfaction of the same debt.

This was a bill filed in the chancery court at Gallatin. At the October Term, 1852, Chancellor RINDLEY, presid-

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ing, there was a decree for the respondents, and the complainants appealed.

GUILD, for complainants.

BALDRIDGE and HEAD, for respondents.

TOTTEN, J., delivered the opinion of the court.

This is an attachment bill in chancery, at Gallatin, to subject an interest in remainder in land and slaves, to the payment of a debt.

The plaintiffs reside in the State of New York, and on the 6th of May, 1842, in the circuit court of the United States, at Jackson, Mississippi, they recovered a judgment for four thousand four hundred and eighty-six dollars and four cents, against said Nathaniel and Daniel Nye. Execution was issued on this judgment, and returned *nulla bona*. On the 20th February, 1843, Daniel W. Nye was discharged in bankruptcy, and the validity of his discharge seems not to be contested. In 1848, the plaintiffs instituted a suit in the superior court of chancery, in the State of Mississippi, against said Nathaniel Nye, and others, the object of which was, to discover and to subject assets fraudulently concealed, to the satisfaction of said judgment. Pending that suit, the present one was instituted in chancery at Gallatin, in which it further appears, that S. Nye died in 1850, leaving his last will and testament, by which he devised and bequeathed to his wife, Elizabeth, all his real and personal estate, "*during her widowhood,*" and at her death, or marriage, the same to be equally divided amongst his children, named in the will, the said Na-

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thaniel G. Nye, being one of them. Elizabeth Nye is in the possession of the estate, under the will, and it being suggested that the slaves would probably be removed to the prejudice of this suit, the tenant for life is made a party, and an injunction was issued, to restrain the removal of the slaves. Nathaniel G. Nye is a citizen of the State of Mississippi, and his interest in remainder, under said will, and which is attached in the present proceeding, is estimated at some two thousand dollars. It is a joint interest with the other tenants in remainder, claiming under the same will. The bill was dismissed by the chancellor, and the plaintiffs have appealed to this court.

1. The defendant, Nathaniel G. Nye, insists that his interest in remainder, in said property, is not liable to be attached and sold in satisfaction of said judgment, because an interest in remainder is not subject, under the law, to judicial sale, for the payment of debts.

The act of 1836, ch. 43, § 1, provides, that, "when any person, or persons, who are non residents of this State, have any real or personal property, of either a legal or equitable nature, or any *choses in action*, within this state," &c., it shall be lawful for a creditor, "without first having recovered a judgment at law," to file a bill in chancery, to have said real or personal property, *choses in action*, and debts attached? This act applies expressly, to non-resident, as well as resident creditors. The act of 1838, ch. 166, § 1, contains, in effect, the same provisions. It applies to a non-resident debtor, who "shall have property, debts, or other effects within this state," and makes the same liable to attachment in chancery, for the payment of his debts. The words of the act of 1836, are: "Any real, or personal property,

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of either a legal or equitable nature;" those of the act of 1838, are "property, debts, or other effects."

Now, what is the nature of defendant's interest in the land and slaves attached? It is a vested remainder; it being a present, fixed right of future enjoyment at the termination of the estate of the tenant for life. "Vested remainders, says Mr. Kent, are actual estates, and may be conveyed by any of the conveyances operating by force of the statute of uses;" 4 Kent's Com., 204, and 149. This applies, of course, to real estate; but it is equally true that a vested remainder in personal estate, may be conveyed by deed, or any informal writing; which will be instead of an actual delivery of possession. A remainder being an actual estate, it must be considered a *property* in the sense of the statute; as much so as the particular estate, for it is a fixed and present right to take effect in *possession*, after the particular estate is spent. The various interests, says Mr. Kent, into which an estate may be divided thus, make, for many purposes, but one estate, being different parts, or portions, of the same entire inheritance; 4 Kent's Com., 198. The one is as much *property* as the other; the difference consists only in the time of its enjoyment. We need hardly observe, that the same rules apply in this respect, to the personal estate; 2 Kent's Com., 352. It seems to us, therefore, that a vested remainder, in real or personal estate, is *property*, in the sense of the statute, and subject to be attached in chancery for the payment of debts.

The case of *Allen vs. Scurry*, 1 Yerg. R., 36, is not in conflict with the present judgment. In that case, it was *held*, that an interest in remainder, in a personal chattel, could not be sold under the writ of *fiat fa-*

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case, at the common law; because the officer could not take possession at the levy, nor deliver it at the sale; both of which are essential to a valid proceeding, under this writ, at the common law. It is true, that Whyte, J., in delivering the opinion, places it also, on another ground: the probable sacrifice of property, on account of the uncertainty, as to the time when the estate might come into possession; but certainly, the first is the true legal reason.

We may observe further, upon the doctrine of this case, which we are not disposed to disturb, that if there be no remedy at law to subject a debtor's estate held in remainder; for that reason, there should be a remedy in equity. For we can see no reason or justice in the proposition, which maintains that the debtor shall hold his estate and the creditor go unsatisfied. We perceive no force in the argument, that the estate might be sacrificed. This is not to be presumed; on the contrary, we are to presume that it will sell for its reasonable value, which can, in most cases, be easily ascertained. Besides, the argument will apply as well, to every forced or judicial sale, where property is sold to the highest bidder; why may not the value of an interest in remainder, be known and given, as well at a forced as at a voluntary sale? A debtor may indeed, vest his entire present funds in the purchase of a remainder; shall he be allowed to hold it to the prejudice of his creditor? We are satisfied, both upon reason and authority, that interests in remainder are subject to the payment of debts. We may add, that this view of the subject, conforms, as we think, to the present policy of the law, which, after abolishing imprisonment for debt, evidently intends to subject every •

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species of property, to which the debtor has right, to the payment of his debts. See act of 1832, ch. 11.

2. In the next place, the counsel for defendant insists that the plaintiffs ought not to be permitted to maintain the present suit, because the suit in chancery in the State of Mississippi, to obtain satisfaction of the same judgment, had been previously instituted, and was yet pending at the commencement of the present suit.

The suit in Mississippi has no reference to the property here in question, its object being to discover and subject such assets of the debtor as may be locally situated in that State; whether an amount sufficient to satisfy the judgment or any considerable part of it, may be realized in that suit, does not appear, nor can appear, until its termination.

In the meantime, we can see no legal or reasonable objection to the institution of the present suit, to obtain the further security of an attachment upon the debtor's property situated in this State, if the creditor have reason to believe the former suit to be of doubtful or contingent result.

It is a remedy to which he, as a creditor, is entitled under the statute; and we are not aware of any legal ground, upon which we can repel him. Certainly he is entitled to but one satisfaction, and if he obtain it in the foreign suit, he will not be allowed to receive it here; but may, in that event, be subject to the costs of the present suit, especially if it appear that it was not probably necessary for his security.

The mere pending of a suit in a foreign court, cannot be pleaded in abatement, or in bar to a suit in our own State upon the same matter; *Mitchell vs. Bunch*, 2 Paige R., 620. And it is generally true,

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that a court of chancery here, in the exercise of its injunctive power over the person of a party, has not any proper authority to restrain a suit previously instituted in the courts of another State or of the United States. Both comity and public policy forbid the exercise of such a power; *Mead vs. Merritt*, 2 Paige, 404; *Diggs vs. Wolcott*, 4 Cranch, 179.

We are satisfied that on both the questions relied upon, the decree of the chancellor is erroneous.

The decree will be reversed and the cause remanded to be further proceeded in, in conformity to this opinion.

Judgment reversed.

FRANKLIN vs. FRANKLIN *et als.* & FRANKLIN vs. HAYS *et als.*

APPEAL. Chancery. If the party dissatisfied with a decree of the chancery court, final as to all the objects of the suit, appeal therefrom and afterwards dismiss his appeal, whereupon the cause is remanded to the chancery court to be further proceeded with, in controlling the management of a trust fund involved, he is bound by the decree from which he had so appealed and cannot have any error therein corrected, or take any other step to amend by introducing new parties. The only remedies left him are a writ of error or a bill of review.

CHANCERY. Pleading. Amendment. If the defendants to a bill in chancery plead the want of proper parties as complainants, and the plea should be allowed, the court should still permit an amendment by adding new parties, if the complainant, who has filed the bill, has, himself, an interest in the proceeding and is a necessary party.

SAME. Trust and Trustees. If one who is charged with the management of a trust fund and has the legal title thereto, be incapable, in consequence of infirm health, to devote such attention to the trust as its magnitude demands, the chancery court may, without divesting him of the legal title to the funds, appoint suitable persons to perform the active duties of trustee.

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These were bills filed in the chancery court at Gallatin upon the facts and for the purposes stated in the opinion. Decrees and orders were made therein and appeals taken therefrom as is also stated in the opinion.

GUILD and E. H. EWING, for complainants.

WHITE and MEIGS, for the executors, F. B. FOGG and EWING & COOPER, for the other defendants.

HOUSTON, Special J., delivered the opinion of the court.

By the will of Isaac Franklin, deceased, complainant and James Franklin, were appointed Trustees of a seminary of learning, for the founding of which the testator provided the funds, chiefly for the education of his own children, and the children of his brothers and sisters. James Franklin died, not having accepted the trust, and it was devolved on complainant, who accepted it, and proceeded to some extent, in its execution. But being infirm in health, and his own family and business requiring his attention, and desiring, for these reasons, to resign the trust, he filed a bill in the chancery court, at Gallatin, in March, 1850, praying to be permitted to resign, and for the appointment of John W., and Albert C. Franklin, and Horace K. Anderson, in his stead, and also for the settlement of his accounts as trustee.

In May, 1850, the court decreed, in accordance with the prayer of this bill; referred complainant's accounts to the Clerk & Master, and the new trustees appeared in court, and accepted the appointment; and in October, 1850, the clerk reported upon the matters referred; the report was confirmed, and complainant was ordered

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to pay over the trust fund in his hands, to the new trustees.

In January, 1851, complainant filed a supplemental bill, asking for new parties in the original proceedings, for the confirmation of what had been done in the cause; reciting the same in the supplemental bill, and also for the appointment of the same persons, as trustees in his place.

In April, 1851, the cause having been set for hearing by complainant's counsel, the executors of the will having been made parties, moved to remand the cause to the rules; because Emma Franklin, the only child of the testator, and others, were necessary parties, and that, although the bill prayed that Emma be made a defendant, process had not been served upon her. But the court overruled the motion, permitted complainant to dismiss the bill as to Emma Franklin, and made a decree, adopting and confirming the former decrees, and appointing John W., and Albert C. Franklin, and Horace K. Anderson, trustees under the will. The court required no security of the new trustees, "in consequence," as the decree states, of the impracticability of its being given under the circumstances "of this case, and the trust fund. But, for the better protection of all parties concerned, the cause is retained for further orders." From this decree, the executors appealed to the December Term, 1851, of the supreme court; and in February, 1851, they dismissed their appeal, and the cause was remanded to the chancery court, "to be proceeded with according to its directions."

In April, 1852, complainant filed a petition in the chancery court, setting forth, substantially, the facts recited, and praying the court to set aside and declare

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void, the previous decrees and orders, and that he be permitted to have reinstated, his said bill, making Emma Franklin a party, that he be permitted to resign, and that other trustees be appointed in place. Process was served upon Emma, and in November, 1852, a guardian *ad litem*, was appointed for her, and by counsel, she moved to quash the *subpoena* and notice, and to dismiss the petition, which was decreed accordingly, and from this decree complainant appeals to this court.

The only purposes of the original and supplemental bills, were, to enable the complainant to resign the trust, and have other trustees appointed in his place, and to have his accounts settled under the decrees of the court. So far as the court had power, these ends were attained by the decree of April, 1851. The resignation was accepted; other trustees were appointed; complainant's accounts were passed upon, and settled, and he was ordered to pay over the trust funds in his hands, to the appointees of the court. This was, therefore, as to all the objects of the suit, a final disposition of the cause. and after the term had elapsed, it could be corrected or reversed, if erroneous, only by writ of error to this court, or by bill of review. But no such bill was filed, and although an appeal was taken, it was dismissed on motion of appellants, and this left the decree in the same condition as if there had been no appeal. And we regard all the proceedings in the chancery court, subsequent to the appeal, including the petition and proceedings thereon, as irregular and void, and that the appeal from the decree dismissing the petition, does not bring before this court any of the decrees pronounced in the cause, prior to the filing of the petition, and whether erroneous or not, or void, or valid, we cannot investigate

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in this proceeding. The appeal in this case, no more brings before this court the original decrees, than would an appeal from a decree dismissing a bill of review have that effect, when the bill is filed after the time for filing such bill has elapsed; this fact appearing on its face. It is true, that the cause was retained in court for further orders; but this was done alone for the purpose of protecting the persons interested in the trust, and for the preservation of the trust property, and not for any further action in reference to the original objects of the proceeding.

We do not mean to question the authority of the case of *Morris vs. Richardson et als.*, 11 Humph., 389, in which it is held, that upon an appeal to this court, from a proceeding in equity, the case is heard upon its merits, as if no decree had been pronounced in the court below, and such decree made as may be deemed proper upon the whole case. In that case, an interlocutory decree had been set aside at a subsequent term of the court. But the cause was still in court, the parties all there, and the interlocutory decree could not be brought here for revision, until there was a final decree, from which an appeal would be taken. But in this case, the decree of April, 1851, was final, and the complainant, and the cause, as to him, were virtually out of court.

We, therefore, affirm the decree of the chancellor, dismissing the petition, and order that the costs be paid by complainant.

In the other case of *Wm. Franklin, trustee, &c., vs. O. B. Hays & J. Armfield, ex'rs.*, et als., the bill was filed on the 23d August, 1851, while the said appeal was pending to compel the executors to account for and pay over to complainant, as trustee, the funds and property appropriated by the testator to the use of the seminary. To this bill,

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the defendant pleaded the matters of record set forth in the preceding case, and alledging that in consequence thereof, the complainant was no longer trustee, and had no right to bring this bill, they being answerable, only, to the new trustees. Complainant set this plea down for argument; it was allowed by the court; the bill dismissed, after overruling complainant's motion to amend the bill by making John W. and Albert C. Franklin, and Horace K. Anderson, parties, and complainant appeals to this court.

We think this plea was properly allowed; but this does not necessarily terminate the suit. In Story's Eq. Pl., § 744, speaking of a plea for want of proper parties, it is said that, "upon arguing a plea of this kind, the court, instead of allowing it, has given the plaintiff leave to amend the bill upon payment of the costs, a liberty which he may obtain after the allowance of a plea according to the common course of the court; for the suit is not determined by the allowance of a plea, as it is by the allowance of a demurrer to the whole of a bill," &c. And the same doctrine is laid down in 1 Danl. Ch. Pl. & Prac., 337.

Such being, in our view, the law, was this a proper case for the amendment proposed? It is admitted by complainant's counsel, and properly, that when the party who files the bill as sole plaintiff has no interest, no amendment can be made, adding new parties. But it is insisted that William Franklin has an interest, and is a necessary party.

By the eighth clause of the will, the testator gives and bequeathes all the property appropriated to the founding of the seminary, to his brothers, James and William Franklin, in trust, for the purposes mentioned, and then

[*Franklin vs. Franklin et al., & Franklin vs. Hays et al.*]

uses this language: "And after the death of my aforesaid brother, it is my will and desire that the aforesaid trust be continued and pass over forever, in the heirs of my said brothers, to pass the estate," &c. By this clause, it is clear, we think, that the legal title to the property was vested in James and William Franklin; and the question arises, is this legal title still in William Franklin, or was it divested out of him by the decrees of the chancery court before referred to? The language of the court in the decree of May, 1850, is, "that the said William Franklin be permitted to resign as trustee as aforesaid, and to appoint the said John W. Franklin, Albert C. Franklin and Horace K. Anderson, trustees, in his room and stead; which appointment the said John W. Franklin, Albert C. Franklin and Horace K. Anderson, here, in open court, accept, and is approved and confirmed by the court. And the said trustees, appointed as aforesaid, do take upon themselves the execution of said trusts, and place the seminary of learning specified in the will, into full operation as soon as practicable." The language of the decree of April, 1851, is, "that the former decrees of this court be, in all things adopted and confirmed, and made part of this decree, and that the said John W. Franklin, Albert C. Franklin and Horace K. Anderson, be appointed trustees under the will of Isaac Franklin, possessed of all the rights, powers and privileges possessed by the said William Franklin, and subject to, and shall be liable to all the duties and restrictions imposed on the original trustees."

It will be perceived at once that there is nothing in these decrees, purporting in terms, to divest the legal title out of William Franklin and to vest it in these

[*Franklin vs. Franklin et al.*, & *Franklin vs. Hays et al.*]

other persons. If it is done, it is done by implication, but we do not think that the language or terms used, amount to such divestiture of title. There is nothing done, but what might very properly be decreed by a court of equity, under the circumstances of the case. There is a very large amount of money and property appropriated to founding a Seminary of learning, requiring much energy and activity in those upon whom devolves the management of the institution and its funds, and here is an only trustee, upon whom rests all this labor and responsibility, infirm in health, and unable for this and other reasons to perform the active duties of trustee, and the trust should not fail for this reason. And we think a court of chancery has power, without the aid of the act of 1851, ch. 107, § 1, in order to carry out the objects of the trust, to appoint suitable persons to perform the active duties of trustee, leaving the legal title still in the original trustee. We can readily imagine cases of trust, in which the courts have not the power to divest the legal title out of the trustee, and in such cases, if the trustee were unable to execute the trust, it would fail, unless our courts of chancery have power to appoint others to perform the duties required. And such is the effect, only, of the decrees of May, 1850, and April, 1851. We think, therefore, that the legal title is still in complainant, that he has an interest in, and is necessary party to the suit. And it results from our view of the case, that John W. and Albert C. Franklin and Horace K. Anderson, the appointees of the court, to control the institution and its funds to some extent, are interested and necessary parties.

We do not deem it necessary to decide the question, whether or not the courts of Tennessee have the power

[Richardson, *adm'r.*, vs. Parker.]

to divest the legal title to the property out of Wm. Franklin, being a fund provided for a charity, or for the founding of a literary institution, in which case, the donor has seen proper to vest the legal title to the fund in trustees, to hold until their death, and then "to be continued and pass over forever, in their heirs, to pass the estate." It is sufficient for this case, that such, in our view, has not been the result of the action of the chancery court at Gallatin.

We therefore reverse the decree of the chancellor, dismissing the bill and remand the cause to the chancery court, where complainant will have leave to amend by making John W. and Albert C. Franklin, and Horace K. Anderson parties to the bill, and we order the costs to be paid by the executors out of the trust fund.

RICHARDSON, *adm'r.*, vs. PARKER.

INSOLVENT ESTATE. *Set-off.* Though the estate of an intestate be insolvent, yet one who is a creditor of the estate and also its debtor, (both debts having been created in the life time of the intestate,) may, in an action upon the claim against him by the administrator, set-off his demand against the estate to its full amount.

At the February Term, 1852, of the circuit court of Lawrence county, WALKER, Judge, presiding, there was judgment in this case, upon the facts set forth in the opinion, for the defendant, and the plaintiff appealed in error.

[Richardson, adm'r, vs. Parker.]

No attorney appeared for either party.

CARUTHERS, J., delivered the opinion of the court.

Dr. W. P. Rowles died, leaving an account for professional services, against Noah Parker, for twenty dollars. The plaintiff, his administrator, suggested the insolvency of the estate, before the proper authority, under the acts of assembly, on that subject. After which, he took out a warrant on the said account. Before the magistrate, the defendant presented an adverse account against the deceased, for work and labor for him before his death, for twenty-two dollars and fifty cents, which he offered as a set-off. The set-off was allowed before the justice of the peace, and also in the circuit court on appeal. Was this right? We think it was. The objection taken to it is, that the debt against the defendant, was a part of the assets to be distributed *pro rata*, among all the creditors, and that the defendant's account must be filed, and be subject to a rateable deduction, if the estate turned out to be insufficient to pay all the debts. That if he is allowed to plead his account as a set-off, he will, in that way, get the whole of it, to the prejudice of other creditors. Though this reasoning is plausible, it is not sound. The notes and accounts of the deceased are not assets, if they have been discharged by payment, the creation of adverse accounts, or otherwise. It is only what remains after all just settlements with the debtors of the estate, which goes into the fund for distribution. Such is the rule in the case of bankrupt estates, and we consider the analogy complete. By the act of 1852, ch. 284, §§ 49, 50, this rule is expressly laid down. This we regard, as only declaratory of what the law was before. The case

[Brown vs. Crump's adm'r.]

before us is a good illustration of the justice of this principle. In 1848, the account with the deceased was contracted; it was a fee for filing an answer in chancery for defendant. In 1849, the adverse account was made. Its items are, forty-two days' work at fifty cents a day, and one day hauling wood, at one dollar and fifty cents. It cannot be doubted, that it was the intention of the parties, that the latter should discharge the former account, and it would be most unjust to lay down a principle that would produce a different result. The settlement of the parties, perhaps, when receipts would have been passed, was only neglected on account of the fact, that each knew there was nothing between them, as their accounts were so nearly equal.

There can be no doubt but that justice has been done, and we think, in accordance with law.

Let the judgment below be affirmed.

BROWN vs. CRUMP'S adm'r.

MECHANIC'S LIEN. Journeyman. Notice. Under the second section of the act of 1846, ch. 118, the journeyman, in whose favor a lien may be created, in order to secure the lien, must give notice to the owner or proprietor of the lot upon which the building is to be or has been erected, as the statute provides. If he neglect to do so until the owner pay to the undertaker the price stipulated to be paid for the building, &c., then the lien is defeated.

This was a bill filed in the chancery court at Galatin by the complainant to assert the lien which he alleged had accrued in his favor under the statute of

[*Brown vs. Crump's adm'r.*]

1846, ch. 118, § 2. The complainant did the work for which he seeks to obtain compensation as a journeyman stone cutter, having been employed to do so by Lewis Crump, the respondent's intestate, who had undertaken to build a family vault upon a contract with the executors of Isaac Franklin, deceased. Crump's estate being insolvent, the complainant prayed in his bill that he should have priority over other creditors, and that out of the fund which had been paid by Franklin's executors to the respondent as administrator, he should be paid the full value of the work done by him upon the vault. There was no allegation or proof of notice to the executors by the complainant that he would insist upon the lien given by the second section of the act of 1846. Chancellor RIDLEY, at the April Term, 1852, dismissed the bill and the complainant appealed.

GUILD and SOLOMON, for complainant.

JOHN J. WHITE, for respondent.

McKINNEY, J., delivered the opinion of the court.

This bill was brought to enforce a mechanic's lien, under the second section of the Act of 1846, ch. 118. It is manifest, however, from the complainant's own showing, that no lien, in his favor, ever was created.

By the first section of the act, a lien is created in favor of the principal mechanic or undertaker, upon the lot of ground or tract of land on which, by special contract with the owner thereof, or his agent, the former may have built, constructed or repaired, in whole or in part, or furnished materials, or any part of the

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materials, in the construction, building or repairing of any house, fixtures or improvements; which lien shall continue for the term of one year after the work done or materials furnished.

By the second section, the benefit of such lien is extended to the journeymen workmen of such undertaker, or such other persons as may be employed by or under him, to do any part of the work, or furnish any of the materials; who shall be authorized to enforce such lien, in preference to said undertaker: Provided, notice in writing of said lien shall be first given to the owner or proprietor of said lot, tract of land, house or improvements, or to his agent, at the time said work is begun, or materials furnished by said journeymen or other person.

By the latter section, the journeymen or other person, doing any part of the work, or furnishing any part of the materials, is substituted, *pro tanto*, to the rights of the undertaker in respect to this lien, provided notice be given as required. But, as the payment of the stipulated amount of money by the employer to the undertaker, in the absence of such notice, would discharge and put an end to the lien, it necessarily follows, that the neglect to give such notice or to take any step to fix the lien, until after payment of the full amount has been actually made by the employer to the undertaker, wholly defeats the right of such journeyman or other person. Upon such payment being made, the lien is extinguished, as to all persons, and for all purposes. The journeyman or other person, provided for in the second section, can afterwards look only to his immediate employer; and his relation to such employer is simply that of a general creditor; he stands upon no

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other or higher ground than other creditors. The statute gives him no lien upon the money in the hands of the employer. The lien can exist only as against the owner of the property, not as against the undertaker. It is clear therefore, that inasmuch as the complainant failed to give the notice required or to take any step to fix the lien in his favor, until after payment of the entire price of the work by Franklin's executors to the defendant, he has no equity entitling him to a preference over the other creditors of Crump's estate. The allegation in the bill, that, by agreement with Crump, the complainant was to have a lien upon the *money*, (if effect could be given to it, if proved,) is wholly unsupported by evidence.

This case is wholly different from that of *Henley vs. Crump's ad'mr. and Franklin's ex'rs.*, decided at a former term of this court. In the latter case, the bill was filed *before* payment had been made by Franklin's executors to the defendant. The executors of Franklin were parties to the bill, and the fund had been enjoined in their hands; and it was held, that as the object of the notice required by the second section of the act, was merely to secure the employer against the hazard of being compelled to pay the money twice; and that forasmuch as Franklin's executors, who still had the money in their hands, could not possibly be prejudiced by the omission of Henley to give the notice required; and having no interest whatever in the question whether the money should pass into the hands of complainant, Henley, or to the administrator of Crump, they could not, merely on the ground of want of notice, resist the relief sought by the bill; neither could Crump or his personal representative, defeat

[*Frazer vs. The State.*]

the complainant's equity on that ground, as the notice required by the statute was a matter with which he had nothing to do.

That case, and the case now under consideration, proceed upon the same principle, and are perfectly consistent with each other. In the former case, the complainant took sufficient measures to fix his lien *before* the fund passed from the hands of Franklin's executors to the defendant. In the present case, the complainant neglected to take any measure to establish a lien in his favor until *after* payment of the money to the defendant, whereby his equity was wholly lost.

The decree will be affirmed.

FRAZER *vs.* THE STATE.

COSTS. Prosecutor. The mere fact that the grand-jury ignore a bill of indictment, is not sufficient evidence that the prosecution is frivolous or malicious, to authorise the court to tax the prosecutor with the costs of the prosecution. The statutes authorising this to be done intend that the facts must appear from the proof on the trial.

Upon the facts stated in the opinion, the circuit court of DeKalb county, CULLOM, Judge, presiding, at its December Term, 1851, rendered the judgment from which the plaintiff in error, appealed.

S. TURNER, for Frazer.

ATTORNEY GENERAL, for the State.

[*Frazer vs. The State.*]

TOTTEN, J., delivered the opinion of the court.

An indictment against Matthew Jones, for frequenting a bawdy house, was returned into court by the grand jury, "not a true bill." Henry Frazer was the prosecutor, and one of the witnesses before the Jury. The Attorney General moved the court to tax the prosecutor with costs. No proof was adduced in support of the motion. The court, assuming, from what appeared of record, that the prosecution was *frivolous*, adjudged that the prosecutor pay the costs, and he has appealed in error to this court.

We think the judgment of the court was erroneous. If it appear to the court that the prosecution is frivolous or malicious, it is proper that the prosecutor be taxed with the costs; 1794, ch. 1, § 75; 1813, ch. 136, § 3; 1817, ch. 100. But the statutes intend that the facts must appear from the proof in the case, as where the defendant is tried and acquitted upon an indictment or presentment, or tried and discharged before a committing justice. In these cases, the character of the prosecutor will appear from the proof adduced at the trial. And if it appear to be frivolous or malicious, it is the duty of the court, in discharging the defendant, to tax the prosecutor with the costs, and render judgment against him therefor. But it cannot so appear, from the mere fact that the grand jury *ignored* the bill. The cause that induced it to be preferred before them, whether probable or not, does not appear to the court. It merely appears that twelve of the jurors did not concur in finding it a true bill. It might be, that all but one did concur, and yet, neither that fact, nor the proof upon which they acted, would appear to the court; for the proceeding before the grand jury, is, in

[Studdurt vs. Fowlkes.]

its nature, an *ex parte* and secret inquisition; not in general, to be made public. Nor was it intended by these statutes, that there should be a separate trial upon the question of probable cause. It is to be considered as incidental, merely, to the principal case.

A different rule might depress and discourage prosecutions, in many very proper and probable cases.

Let the judgment be reversed.

STUDDURT vs. FOWLKES.

CERTIORARI AND SUPERSEDEAS. *Practice.* Upon a motion to dismiss a petition for writs of certiorari and supersedeas, which have already been granted, no extrinsic evidence should be heard by the court, either presented by affidavits or otherwise, to falsify the statements contained in the petition. The judgment, upon the motion, must depend upon the sufficiency of the facts stated in the petition to authorize the granting of the writs. The cases of *King vs. Rutherford*, 1 Ten. R., 191, and *Stewart vs. Hall*, 2 Ten. R., 179, are overruled.

Upon the facts stated in the opinion, the circuit court of Hickman county, at its October Term, 1852, WALKER, Judge, presiding, rendered judgment for the defendant, from which the plaintiff appealed in error.

FLIPPIN, for plaintiff in error.

M. S. FRIERSON, for defendant in error.

TOTTEN J., delivered the opinion of the court.

[Studdurt vs. Fowlkes.]

A judgment was rendered before a Justice of the Peace, in favor of Fowlkes against Studdurt, for one hundred and seventy-eight dollars and sixty-five cents, and execution issued thereon. The defendant brought his petition for certiorari and supersedeas, which was granted by the judge in vacation. At the return of the writs in the circuit court of Hickman, a motion was made to dismiss the said petition and writs. The petition states sufficient ground for the writs. It states that the debtor had caused a solvent and proper person to offer himself before the justice as stayor; that "he was accepted by the justice" in the time allowed the defendant to stay the judgment; that on application of the plaintiff, and without notice to defendant, the justice issued an execution on the judgment, notwithstanding the same had been stayed.

The affidavit of the justice was received to disprove the petition; and it denies, in effect, the truth of said statements. The petition was thereon dismissed, and the defendant has appealed in error to this court. The question is, was it proper to admit and consider the affidavit of the justice, or other extrinsic evidence, on a motion to dismiss the said petition? We are of opinion that it was not.

The motion to dismiss involves the question, whether the matters stated in the petition shall be tried upon their merits, or not. It is in the nature of a demurrer to other pleadings; and, admitting the facts stated in the petition to be true, it denies that they are sufficient in law to entitle the party to the prayer of the petition. If the motion be well taken, the petition is dismissed; if not, it is retained, and the case, or matter contained in it, is tried upon its merits.

[Studdart vs. Fowlkes.]

The motion to dismiss is merely preliminary, and its object is to cut off and preclude any enquiry into the merits of the case. If the facts stated in the petition prove to be untrue at the trial, the party will take no benefit by his false petition, and may be criminally liable for its statements. There is good reason, therefore, for taking it as true, in the preliminary motion to dismiss. But, if counter affidavits were allowed, then rebutting affidavits must also be allowed; and both to an indefinite extent. They are *ex parte* affidavits, and neither party has the right to cross-examine. They may involve every fact stated in the petition, and in this manner the court is to try the issues of fact made by the parties, on a motion to dismiss. If he err against the petition, in this imperfect and irregular mode of trial, injustice has been done. If he overrule the motion, then the same issues of fact, perhaps, are to be again tried in a formal and regular manner. The practice is not well calculated to attain the ends of justice; it is highly inconvenient in itself; it admits *ex parte* evidence, without the benefit of cross-examination, and submits questions of fact to be tried by the judge, instead of the jury; and in these respects, it violates principle. Nor can we see that these evils are compensated by corresponding advantage. It is a practice of unmixed evil, and we think it has not been adopted very generally in the circuit courts of the State. It is material that the practice be uniform, and hence we have thought it proper to say that the cases of *King vs. Rutherford*, 1 Ten. Rep., 191, and *Stewart vs. Hall*, 2 Ten. Rep., 179, stating a different rule, must be considered as overruled.

In these cases, Overton, judge, dissented; and for reasons which we consider were not answered by the other

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judges. In *Beck vs. Knabb*, 1 Ten. R., 55, it was held that the cross-affidavit of the party was inadmissible. If affidavits are admissible at all, why may not the affidavit of one party rebut the affidavit of the other? The better practice is, as it seems to us, that the motion to dismiss be determined upon the facts stated in the petition.

Let the judgment be reversed, and the cause be remanded.

CLACK vs. WHITE.

NUISANCE. *Private. Chancery.* The court of chancery has power to interpose in behalf of one who is injured by a continuing, permanent or recurring, private nuisance, unless the injury be such as may be compensated in damages.

CHANCERY. *Injunction. Private way.* Assuming that the county court has the constitutional authority to open a private way, yet a court of chancery will not interpose by injunction to prevent the owner of the land over which the way is granted, from placing and continuing in the way such obstructions as would make it useless for the purpose intended, if it appear that the way was opened without reference so much to the interests of him over whose land it passed as to the interest and convenience of him for whose benefit it was ordered to be opened. To authorize the interposition of the injunctive power of the court in such case, it must appear that in locating the way the least possible injury that could be, consistently with the end to be attained, is done to the owner of the land.

CONSTITUTIONAL LAW. *Private ways. Act of 1811, ch. 60.* The act of 1811, ch. 60, conferring upon the county court authority to open private roads is repugnant to the constitution and void.

This was a bill filed in the chancery court at Pulaski. At a special term of the court in March, 1852, chan-

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cellor BRIEN, presiding, there was a decree for the complainant and the respondent appealed.

M. JONES and BROWN, for complainant.

BRIGHT, for respondent.

TOTTEN J., delivered the opinion of the court.

The plaintiff, Clack, brings his bill against the defendant, White; and upon the matters stated in the bill, invokes the exercise of the injunctive power of the court, to protect him in the free and undisturbed possession, use and enjoyment of a right of private way, to which he says he is entitled, over the defendant's land.

The prayer of the bill was granted by the chancellor and the defendant appeals to this court.

The private way is claimed by the plaintiff, under an order and grant from the county court of Giles, made in pursuance of the act of 1811, ch. 60. It empowers the county court, in a given state of facts, to grant to one citizen a right of private way over the land of another. The plaintiff resides near Pulaski on the Campbellville road, and has resided there some ten years. Before that time he resided on his plantation, where most of his slaves and property are situated, some three miles from Pulaski, to and from which place, it is material to his interest, that he have a right of way. The defendant, White, and Benj. Carter, own the intermediate lands, and refuse a right of way; White owns some five hundred acres, a valuable tract; the said Campbellville road passes over it, leaving one-third of

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it east of the road. The private way granted to the plaintiff, is on the west side of this road, begins at a large spring, the joint property of plaintiff and defendant, and extends to the Campbellville road, a distance of some four hundred yards, over the enclosed lands of the defendant, and "passing out, to the public road, at a pair of drawbars, where was recently a gate." The court granted to the plaintiff the right to "open said road fifteen feet wide, to keep the same in repair and to have and use the same as a private way." This way cuts the defendant's land, west of the public road, into two other sections of irregular and inconvenient form. The jury assessed the damages of defendant at thirty dollars, which he received, but tenders the same back in his defence to the present bill. The plaintiff owns a narrow strip of land from the spring to his farm, which makes his way complete. He opened his private way, removing defendant's inclosures for that purpose. The defendant replaced his fence across the private way, felled some trees across it, in order to obstruct it, and threatened the life of the plaintiff, if he offered to remove them, or to keep the road open. He resisted said order, granting the right of way and insisted that it was void.

For these injuries no action at law has been taken, but the plaintiff brings his bill in the first instance to cause the private nuisance to be removed and the defendant to be enjoined from disturbing him, the said plaintiff, in the proper and peaceable enjoyment of his right of way. Such are the leading features of the case, involved, as it is, in a mass of facts not material at present to be more fully stated.

Several questions are made, by defendant's counsel,

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upon the chancellor's decree; and it is insisted, that it is erroneous.

First: That the plaintiff has a remedy at law.

Second: That the fact of nuisance should first be established at law.

Third: That the county court had no power under the constitution to grant the private way.

Now the right of way which the statute intends to confer is not merely personal or *in gross*, but is appendant and annexed to the estate. It is claimed and granted in virtue of an ownership of land and must be connected with it. The private way was obstructed by the owner of the land over which it passes. The injury therefore, is strictly a private nuisance; 3 Bl. Com., 218, 241.

As to the remedy, it may be by the mere act of the injured party; for he has right to enter peaceably upon another's land and abate the nuisance; 3 Bl. Com., 6; Adam's Equity, 24; or, by action on the case for damages; in which the party shall recover satisfaction for the injury sustained; but cannot, thereby, remove the nuisance. It is true, that every continuance of a nuisance, is held to be a fresh one; for which another action will lie and other damages may be recovered; and to give the greater effect to the remedy the jury may, in a second action, punish an obstinate defendant by giving exemplary damages. But still the injury remains. It could only be removed, in a case of private nuisance, by the *assize of nuisance*, a writ not adapted to our mode of judicial procedure; 3 Bl. Com., 221.

It is clear, that the remedy at law, for a private nuisance, is imperfect and inadequate, and that a complete and perfect remedy can only be had in a court

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of equity. The remedial justice of the court of equity, may be promptly applied before great and irreparable injury has been done. It may remove the present nuisance, and perpetually enjoin the party from renewing it in future. It avoids a multiplicity of suits, and oppressive and expensive litigation. Upon these, and other grounds, the jurisdiction of the court, in a case of continuing, permanent or recurring, private nuisance, is firmly established. But no injunction will lie, if the injury be such as may be compensated in damages; as where it is merely transient and temporary in its character; 2 Story Eq. Jur., § 925; *Earl of Ripon vs. Hobart*, 1 Cooper, sel. cases, 333; *Garner vs. Village of Newburgh*, 2 J. C. R., 161.

In the last case, Mr. Kent says, the inference rests on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which, upon just and equitable grounds, ought to be prevented. To the same effect are *Caldwick vs. Knott*, 10 Yerg., R., 210; and *Vaughn vs. Law*, 1 Humph. R., 131. In this latter case, Greene, J., delivering the opinion of the court, says: "In a case where the right is clear, and the existence of the nuisance manifest, and the injury is of a character that cannot be compensated in damages, a court of chancery interposes to prevent the mischief. In such case, a trial at law is not necessary in order to give the court jurisdiction. In Adams' late work on the doctrine of equity, it is said, "there is a jurisdiction in equity to enjoin, if the fact of nuisance be *admitted, or established, at law*;" Adams' Equity, 211; and several cases are cited. But we think that the rule is well and truly stated in *Vaughn vs. Law*. Certainly.

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the *admission* of the party is perfectly conclusive; but, if the fact of nuisance manifestly appear, from certain and reliable proofs, we see no reason why it should be first established in a court of law, if that be the only objection.

In the present case, the right depends upon the grant made by the county court, affirmed on appeal, in the circuit court. We do not assume, in this collateral suit, to revise that proceeding. If it be merely irregular, and not void, it remains in force and effect, until reversed upon error. We see, indeed, no valid objection to the *mode of procedure*; and if the court had the power, under the statute, to grant a private way over the defendant's land, then it is well granted, and the plaintiff is seized of a legal title to it.

It is also admitted in defendant's answer, that the way was opened, and that he afterwards obstructed and closed it. So, that both the legal title to the way, and its obstruction by defendant, appear in the present record. But it does not follow as a corollary, that, therefore, the injunction will lie. The special injunction is not a writ of right, but it rests in the sound discretion of the court, and hence, Mr. Story says: "No injunction will be granted whenever it will operate oppressively or inequitably, or contrary to the real justice of the case;" 2 Story Eq. Jur., § 959. It may safely be assumed, that the injunction will not lie, unless the right be clear and certain, and rests upon just and equitable grounds. If the county court had the power to grant a private way to a private citizen, over the land of another, it was a most delicate power, and should be exercised only, in case of imminent necessity. It cannot apply to a case of mere interest and convenience.

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Now, to test the present case by these just and reasonable rules: The public way and the private way, cut the defendant's land into three irregular and inconvenient sections. The private way is opened, as a lane over his land; it separates his house from the valuable spring before mentioned, and passes near his houses. He is denied the privilege of gates at the termini of the private way; a privilege that is granted in some instances, even in case of public roads, and is put to the inconvenience and expense of making separate enclosures of the ground over which it passed. A valuable farm is thus seriously injured, and the indemnity assessed by the jury is fixed at thirty dollars, which a number of witnesses, some of them of the jury, say, that the injury cannot be less than four hundred dollars.

Certainly this private way does not rest upon such just and equitable grounds, as commend it to the special protection of a court of conscience. We may further observe, that it was not the nearest way; nor so laid out as to do the least injury to the owners of the lands. For it appears that it might have been located principally upon their dividing lines. Nor do we think that there was such strong and imminent necessity for the private way, as the strictness of the rule would require. Certainly it was, as surveyed, the best and most convenient way for the plaintiff. But there were other ways, a little further, or not quite so even, which might have answered his purposes, and been more consonant with the interests of others.

Considering the case upon its merits, therefore, and conceding for that purpose, the contested power of the county court, to grant the private way, yet, we do not

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think, that in justice, equity and reason, it is a proper case for a special injunction.

Third: But the counsel for defendant takes still higher ground, and insists that the act of 1811, ch. 60, is repugnant to the constitution, and void. This act confers upon the county court the power to grant a "private road," in case the lands of any person be surrounded by the lands of any other person, or persons, who refuse to allow a private road over their lands. The court may appoint a jury of view to mark out the road, assess the damage done to the owner of the land, and report the same to the court, which court shall have power to grant an order to the petitioner to open such road, not exceeding fifteen feet wide, and to keep the same in repair.

It is a grant of a private way, annexed and appendant to the petitioner's land. Now, what is the nature of this right, and how is it acquired at the common law? It is an incorporeal hereditament; an easement upon the land of another, and not an interest in the land itself; 5 Barn. & Cress., 221. It consists in a "right of private way over another man's land, and may arise either by grant of the owner of the soil, or by prescription, which supposes a grant, or from necessity;" 3 Kent. Com., 419; 3 Bl. Com., 35, and note 27.

A way of *necessity*, is but a way by grant. If a man sell me land that is wholly surrounded by his own, I am entitled to a way of *necessity* over his land, to come to my own; though it was not expressed in the grant. It is implied as an incident to the grant, and *passes under it*; For, without the way, the grant could have no effect; and it is a general rule, that when the use of a thing is granted, every thing is granted

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which is necessary to its proper use and enjoyment; Co. Litt., 56; 2 Com., 56. Sergeant Williams says, the *way of necessity* is so called, because it is a necessary incident to the grant; and he is of opinion that it is founded entirely upon grant; 1 Saund. R., 323, note 6; 3 Kent. Com., 424. It is not, therefore, to be taken in a general and independent sense; as that it is necessary for me to have a right of way over my neighbor's land. I can only have it as in case of other property; by his consent, express or implied.

A way of necessity, therefore, like other private ways, is founded in grant by the owner of the land over which it passes; and it can have no existence upon any general idea that it is convenient or even necessary to a person to have a private way. Now, the statute confers upon the county court the power to grant a right of way, against the will of the person who owns the land. It takes from him, *in invitum*, a part of his private estate, and gives it to another, as a private right, for such indemnity as a jury may assess. Now, we deny that any such power exists, under the Constitution of the State. The right to private property is under the protection of the Constitution, and is to be held as sacred and inviolable.

The legislature has no power to take or invade it for any mere private purpose, or to transfer it from one person to another against the will of the owner, whether indemnity be provided for it or not. The will of the owner is, in this respect, stronger than the legislative power, and if he refuse to grant the private way, we are not aware of any power by which he may be enforced to grant it. If it could be held a valid power in the present instance, so it could be held in many others,

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under the pretext of necessity, policy or convenience. On the contrary, we consider it a settled doctrine, that a law, which is intended to have the effect to transfer the private property of one man to another, against his will, is powerless and void; no matter under what pretext of policy or convenience it may be made; *vid.* Bill of Rights; 2 Kent. Com., 13 and 339; *Wilkinson vs. Leland*, 2 Peters' R., 659; *Varick vs. Smith*, 5 Paige R., 5; *Hoke vs. Henderson*, 4 Dev. R., 15; *Harding vs. Goodlett*, 3 Yerg. R., 41.

Nor can the power insisted on in the present case, be found in the right of eminent domain. This right, inherent in the State, can only be exercised for the public advantage; and not for that of any mere private person. The right of eminent domain or inherent sovereign power, says Mr. Kent, gives to the legislature the control of private property for public uses, and for *public uses only*; 2 Kent., 339.

It undoubtedly must rest, says the same author, as a general rule, in the wisdom of the Legislature, to determine when public uses require the assumption of private property; but if they should take it for a purpose not of a public nature, as if the legislature should take the property of A and give it to B, or if they should vacate a grant of property or of franchise, under the pretext of some public use or service; such cases would be gross abuses of their discretion and fraudulent attacks on private rights, and the law would clearly be unconstitutional and void; 2 Kent's Com., 340. In *Taylor vs. Porter*, 4 Hill's N. Y. Rep., 140, the precise question now before us, was ably considered, and it was *held*, that a statute similar in every respect, to ours, was unconstitutional and void. Mr. Kent, referring to the judg-

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ment in that case, considered that it was founded on just principles, and fully approved it; 2 Kent's Com., 339, note c. We may observe, also, that the doctrine held here, can work no great inconvenience, if that were a consideration; as *public* roads of every grade and character, to suit the convenience of the people, may lawfully be laid out and established; *vid.* act of 1820, ch. 6.

By these inferior roads, of the second and third class, every neighborhood may be accommodated, and the citizen be enabled to have a convenient way to go to mill and to market, to church and to the ballot-box.

The decree of the chancellor is reversed, and the bill dismissed.

McKINNEY, J., dissented on the constitutional question.

WHITE vs. CAHAL's adm'r.

CHANCERY. *Jurisdiction.* When a cause, which is exclusively of legal jurisdiction, (e. g., a question of damages for libel and defamation,) has been tried at law, and a judgment rendered against the defendant, and it appear that there was no fraud or concealment by the plaintiff at law, a court of chancery has no jurisdiction to interfere to relieve the defendant.

The bill filed in this case, in the chancery court at Pulaski, at the August Term, 1852, Chancellor BRIEN, presiding, was dismissed, and the complainant appealed.

BRIGHT, for complainant.

[*White vs. Cahal's adm'r.*]

NICHOLSON and ELDRIDGE, for respondent.

F. B. FOGG, special J., delivered the opinion of the court.

This was a bill in equity, filed by A. C. White in July, 1849, to enjoin a judgment obtained by Terry H. Cahal, at the April Term, 1849, of the Giles county circuit court, in an action for libel and slander; wherein the jury rendered a verdict for twelve thousand five hundred dollars. In the month of May, 1851, a supplemental bill was filed to reinstate the injunction. The cause had been submitted to a jury at August Term, 1848, and the jury, not agreeing, a mis-trial was ordered; at December Term, 1848, the cause was continued upon affidavit of the complainant, on account of the absence of Graves, a material witness, as was alleged, by whom it could be proved, there was no publication of the libel. The causes of equitable jurisdiction, as stated in the bill, are, that the complainant was taken by surprise in the trial at law, in April, 1849, as Judge Dillahunty, who continued the cause in December, 1848, had stated from the bench that he would not try the cause; and that White, hearing that Judge Dillahunty would hold the court in April, supposed, as a matter of course, that the cause would not be tried, and left home several days before the sitting of the court, and made no preparation for the trial, and the cause remained undefended. The counsel who appeared for White, not being employed by him, but by his brothers, in his absence, and without his authority.

The bill further states, that he never published the libel, and that he was prevented from having his evi-

[*White vs. Cahal's adm'r.*]

dence at the trial, from the belief that the cause would not be tried by Judge Dillahunty, owing to his declaration from the bench; and that there was an agreement with the counsel for the plaintiff, that the bill of exceptions might be made out at any time before the setting of the supreme court. There is no allegation of any fraud, on the part of the plaintiff at law.

The allegations of the bill as to the surprise; the declaration of the presiding judge, &c.; the agreement of counsel; are denied in the answer, and the proof sustains the answer. There was no demurrer to the bill. Ever since the decision of the case in 1 Schoale & Lefroy, 205-6, the principles regulating the jurisdiction of courts of equity, in interfering with verdicts and judgments at law, have been well settled. Lord Redesdale, in that case, said: "The inattention of parties in a court of law can scarcely be made a subject for the interference of court of equity. There may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law; and therefore, equity does sometimes interfere, as in cases of complicated accounts, where the party has not made defense, because it was impossible for him to do it effectually at law. So where a verdict has been obtained by fraud, or where a party has possessed himself improperly, of something, by means of which, he has an unconscientious advantage at law, which equity will either put out of the way or restrain him from using. But without circumstances of this kind, I do not know that equity ever does interfere to grant a new trial of a matter which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction. A

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bill for a new trial is watched by equity with extreme jealousy. It must see that injustice has been done, not merely through the inattention of the parties, but some such reasons as here I have mentioned, must exist."

This doctrine has been often sanctioned by the supreme court of Tennessee. In the case of *Brandon vs. Green*, 7 Humph., 130, the court say, "when a party who is sued at law, has an unembarrassed defense, he cannot be heard in equity, unless he is prevented from making his defense at law by accident or fraud, or the fault of the other party unmixed with fault or negligence on his part." This principle is adopted to prevent the court of chancery becoming a forum for the releasing of cases which have been tried at law. It is not hereby denied, that a complainant has a right, but it is determined that he has lost his remedy by his negligence in omitting to make his defense at law.

In the present case, the suit at law was exclusively of legal jurisdiction; a question of damages in an action for libel and defamation. There is no pretence there was any fraud or concealment by the plaintiff at law, and a court of chancery has no jurisdiction to interfere according to the case as made in the bill; much less, where the proof is so conclusive, and where the answer is fully supported.

The bill must be dismissed, the injunction dissolved. and the costs be paid by complainant.

The decree is, in all things, affirmed. '

MITCHELL vs. THE STATE.

ROADS. *Overseer.* The overseer of a public road is not excused from the performance of the duties enjoined upon him by the statute, by the fact that before the expiration of the year for which he was appointed, he removes from the "bounds" of that road into the "bounds" of another.

SAME. *Same. Order of the court.* If the order of the county court direct that the overseer of a road shall have the "same list and bounds of hands" that were assigned to his predecessor, it is a sufficient specification of the bounds within which persons were subject to work under him.

SAME. *Same. Waiver.* If the order appointing an overseer be irregular, and he, notwithstanding, proceeds to the performance of the duties of overseer, he thereby waives the irregularity.

At the October Term, 1852, of the circuit court of White county, GOODALL, Judge, presiding, Mitchell was convicted, as stated in the opinion, and he thereupon appealed in error.

S. TURNEY, for plaintiff in error.

ATTORNEY GENERAL, for the State.

TOTTEN, J., delivered the opinion of the court.

The defendant, Mitchell, an overseer of a road, was indicted and convicted for not keeping the road in proper repair.

1. He removed, after his appointment, from the bounds of that road into the bounds of another. This is no excuse; he should have returned the order of his appointment, and moved the court, for sufficient cause, to discharge him from his office.

Having failed to do so, he remained liable to perform its duties, no other overseer being appointed.

2. The order did not specify the bounds within which persons were subject to work under said overseer; but it

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says he was "to have the same list and bounds of hands that worked under James Taylor, late overseer." This made the former order a part of the present order, and is sufficiently certain; and besides, the proof shows that the overseer "proceeded to the performance of the duties of his office," and that is a waiver of any irregularity in the order, if, in fact, one existed; 1819, ch. 26 § 3.

Affirm the judgment.

RIDLEY'S *ex'rs.* vs. BUCHANAN.

PRACTICE. *Nul tiel record.* The issue upon a plea of *nul tiel record* is triable alone by the court, upon an inspection of the record.

PLEADING. *Set-off. Replication.* To a plea of set-off, the defendant may reply both *nul tiel record* and payment.

At the January Term, 1852, of the circuit court of Davidson county, TURNER, Judge, presiding, there was judgment in this case for the plaintiff, the defendants appealed in error, and the plaintiff prosecuted a writ of error.

EWING & COOPER, for plaintiffs in error, argued: It may be considered doubtful whether there can be two replications even to an ordinary plea of set-off. See Chitty's Pl., 582. But when a record is either pleaded or sued upon and the plea or replication of *nul tiel record* is made, there cannot at the same time be an

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issue of fact to the jury; this would be in reality pleading and demurring at the same time; *Chitty's Pl.*, 561; 1 *Johnson Cases*, 104; 10 *Ohio*, 137; 1 *Dev. & Batt.*, 365.

TRIMBLE, for defendant in error, argued: A plea of set-off is in the nature of a cross action and the plaintiff may reply several matters thereto. In practice when no replication is entered a general replication is understood; *Worth vs. Fentress*, 1 *Dev.*, 419; 1 *Mur.*, 154.

McKINNEY, J., delivered the opinion of the court.

The plaintiffs in error were sued in an action of debt. upon certain bills single executed by their testator to the defendant in error. To this action, the defendants below, pleaded, first, a plea of *set-off*, of a judgment recovered in the same court, by confession, at the September term thereof, 1842, in favor of their testator, against said Buchanan, for the sum of one thousand one hundred and fifty-nine dollars and twenty-two cents, which exceeded the debt sued for; and out of which judgment, they offered to set-off an amount equal to the debt and damages demanded in the declaration.

The defendants also pleaded, secondly, the plea of *payment*; and, thirdly, *accord and satisfaction*. To the plea of set-off, the plaintiff put in *two* distinct replications: first, *nul tiel record*; and, secondly, payment of the judgment set forth in the plea. The pleadings appear to have been made up, at the return term, May, 1849. And, at the January term, 1852, the defendant's counsel moved the court to compel the plaintiff to elect on which of the two replications to the plea of set-off.

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nul tiel record, or payment, he would rely. The court sustained this motion, and put the plaintiff to his election; and the plaintiff having elected to rely on the replication of *nul tiel record*, the court ordered the replication of payment to be struck out; to all which, the plaintiff excepted.

At the same term of the court, the several issues, including the issue upon the replication of *nul tiel record*, to the plea of set-off, were submitted to a jury, and were all found in favor of the plaintiff, and, thereupon, judgment was rendered upon the verdict, from which the defendants appealed in error to this court.

The bill of exceptions shows that on the trial, the defendant offered to read as evidence, in support of the plea of set-off, the record of a judgment, by confession, in the circuit court of Davidson, at the September Term, 1852, for one thousand one hundred and fifty-nine dollars and twenty-two cents. The record of said judgment is as follows:

“Jas. Ridley, *Ex'r of Geo. Ridley, vs. Moses Buchanan* :

“The parties appear by their attornies, and the defendant, in proper person, confesses judgment in favor of the plaintiff, for the sum of eleven hundred and fifty-nine dollars and twenty-two cents. Thereupon it is considered by the court that the plaintiff recover of the defendant said sum as confessed, together with his costs and that execution issue.”

The court held that this record was inadmissible under the plea, on the ground that it was a judgment in favor of the defendant's intestate, not in his own right, but as executor of George Ridley. The defendant then offered to prove that James Ridley had accounted and paid to the estate of George Ridley, the amount of

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said judgment, but the court held, that this proof was not admissible under the issue of *nul tiel record*.

From the foregoing statement of the proceedings in this cause, it will be sufficiently apparent, that they are erroneous in several respects, and as to both parties.

1. The court erred in submitting the issue of *nul tiel record*, to the jury. This is an issue, triable alone by the court, upon inspection of the record, and, in the transcript before us, there is no finding or judgment of the court thereon.

2. The court erred against the plaintiff, (who has likewise prosecuted a writ of error to this court,) in striking out the replication of *payment* to the plea of set-off. It is true, in general, that neither at common law, nor under our statute of 1794, ch. 1, § 26, is it allowable to put in more than one replication to the same plea. The statute 4 and 5 Ann. Ch., 16, applies only to pleas, not to replications; and so of the act of 1794, which provides that the "plaintiff in replevin, or defendant in any other action, may plead as many several matters, as *may be necessary for his defense*, so that he be not permitted to plead and demur to the whole."

And it may be observed, that this right to plead several distinct pleas to the same declaration or count, which was unknown to the common law, and which, by the statute, 4 and 5, Ann., requires leave of the court, and is subject to various exceptions and restrictions, is, by our statute, an absolute and unqualified matter of right.

But, although the statute does not, generally speaking, extend to replications, it seems that, under our practice, the case of a plea of set-off has been treated as an exception to this general rule. This exception proceeds upon the ground that the plea of set-off is in the nature

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of a cross-action. With reference to such plea, the attitude of the parties may be regarded as changed. The defendant becomes actor, and must make out his case, upon the plea, as if he were suing in a cross-action. And it would seem reasonable that the plaintiff, against whom the set-off is offered, and who, as to such plea, is put upon the defensive, should be allowed to make his defense in precisely the same mode as if he were sued in a cross-action. And this he can do in no other way than by pleading, in the form of different replications to the plea of set-off, as many several matters as may be necessary for his defense. If this were not allowable, it would be put in the power of the defendant, by electing to set up his demand by way of set-off rather than sue upon it in a separate action, to deprive his adversary of the benefit of several defenses, intended to be secured to him by the Act of 1794; 1 Murphey's Rep., 154. We cannot, upon this point, coincide with Mr. Chitty, who inclines to a different opinion; 1 Chitty Pl., 583.

That, under our practice, a defendant, sued in debt upon a record, might plead *nul tiel record*, and also payment, is a proposition which, we suppose, cannot be controverted. The former may be a proper and necessary defense in such case, upon the ground of a variance in the statement of the record. But as this plea merely puts in issue the existence of the record, as stated, any matter in discharge must be pleaded. Certainly the cases to which we have been referred, are no authority against the propriety of such a practice.

In the case in 10 Ohio Rep., 137, to a special plea in bar, a replication was filed, tendering an issue upon the matter of fact relied upon by the plea; and, at the same time, a general demurrer was filed, going to the entire

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plea. And it was very properly held, that an issue in law and an issue of fact, could not, at the same time, be tendered to the same plea. Such is the uniform rule of the common law, and such likewise is the rule prescribed in the Act of 1794. But the case under consideration is not within this rule. The issue of *nul tiel record*, though to be tried by the court on inspection of the record, is treated as an issue in fact; Chitty's Pl., 653. The case in 1 Johnson's cases, 104, can scarcely be regarded as an authority for any purpose. The action was debt upon a judgment rendered in one of the courts of the State of Georgia. The pleas were: 1st, *Nul tiel record*; and, 2nd, *Nil debit*. On the plaintiff's motion, the court ruled, that the defendant should elect which of the two pleas should stand, and that the other be struck out. The opinion of the court is not given in the report of the case, nor is the reason for this order stated. The plea of *nil debit*, was clearly inadmissible. This question has been generally regarded as put to rest by the case of *Mills vs. Dwyce*, 7 Cranch, 484, and the numerous subsequent cases decided in accordance with it. That case, if it does not go the length of deciding, that, in debt on a judgment from another State, no other plea than *nul tiel record* can be pleaded, it certainly determines that *nil debit* is inadmissible. But the order putting the party to his election, assumes the contrary doctrine, and seems to proceed upon the principle, that the defendant could not plead both pleas to the same count. The reason for this is not given, and we are unable to perceive it. Upon the question whether the record offered in evidence, supports the issue of *nul tiel record*; as also, upon the question as to the evidence offered of payment of the judgment by James Ridley,

[Dice vs. Penn et als.]

to the estate of his testator, we, at present, forbear to express any opinion.

The case must be remanded for trial of the issue of payment, which was struck out by the court, and which will be reinstated. Should this issue be found in favor of the plaintiffs, no judgment upon the issue of *nul tiel record* will be necessary, and if found otherwise, we leave it for the circuit court to render the proper judgment.

Judgment reversed.

DICE vs. PENN et als.

SALE OF LAND. The title acquired by a purchaser at an execution sale, cannot be attacked upon the ground that the creditor in the judgment became the holder of the note upon which the judgment was rendered, by the assignment of the payee fraudulently, and without consideration. If the note, which is the foundation of the judgment, was executed in good faith by the maker, the sale of his land for the satisfaction of the judgment, would not be contaminated by the purpose or manner of the payee in assigning it to him who obtains the judgment.

SAME. Execution. Levy. While it is the duty of the sheriff to levy an execution upon the personal property of the debtor, if any can be found; yet, if the sheriff find no personal property, but makes his levy upon the debtor's land, and afterwards sell it, the title acquired by the purchaser cannot be assailed upon the ground that the debtor had personal property upon which the execution might have been levied.

This was a bill filed in the chancery court at Carthage, by Dice, the complainant, to invalidate a sale of lands, made in the manner stated in the opinion. At the February Term, 1852, Chancellor RIDLEY, presiding, the bill was dismissed, and the complainant appealed.

[Dice *vs.* Penn *et al.*.]

JOHN S. BRIEN and McDONALD, for complainant.

GUILD and FITE, for respondent.

CARUTHERS, J., delivered the opinion of the court.

The defendant, Hughes, brought ejectment against complainant, for a tract of land. This bill is filed to enjoin the same, upon the ground that the deed of Hughes, from the sheriff, is fraudulent, and should be annulled. Freeland had a note against Penn, and the same is assigned to Hughes, who recovered a judgment upon it, before a justice of the peace, who issued an execution, which was levied on his land, and returned to court, where it was condemned, and an order of sale issued, under which Hughes purchased, and took the sheriff's deed. This title is attacked in the bill upon two grounds. 1st: That the assignment of the note by Freeland to Hughes, was fraudulent, and without consideration; and 2nd: There was personal property of Penn known to the sheriff, that was subject to the execution, at the time the land was levied on. The truth of both charges are denied in the answer, and we think, are not sustained by the proof. But if they were made out, we do not think the title of Hughes would be invalidated.

It is not controverted, that the debt against Penn, in favor of Freeland, was just; it is not impeached by the bill; but the objection is, that the transfer of the note to Hughes, was not founded on any consideration, or that it was a fraudulent contrivance. This, if true, would be a question between Hughes and Freeland, as to the proceeds of the sale; or between Penn, the maker, and Hughes, the endorser, in a suit upon the note. No

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one else would have any right to question it. Much less would it affect the title of a purchaser under a sale made to enforce the collection of the debt. Certainly the complainant, as purchaser under a deed of trust made by Penn, covering the same land, could not be allowed to make the objection, as Penn could not have done so himself. It is a question of priority of divestiture of title out of Penn. The levy of Hughes' execution, being before the registration of the deed of trust, under which complainant claims, constitutes, when regularly pursued to a sale, by the sheriff, and deed from him to the purchaser, the first and best title to whatever right Penn had to the land, at the time of the levy. This title cannot be collaterally attacked upon the ground that the judgment creditor is liable to some accountability on the note on which he sued, to a previous holder. It is true, that a title derived under a fraudulent arrangement, between Penn and Hughes, by which a debt would be created, for the purpose of defeating others, might contaminate the whole proceeding, and overthrow any title that might be derived under it. But if the debt was just against Penn, it cannot be perceived how objections to its transfer, could affect a sale made for its collection. The fact that the land was bid off by the judgment creditor, even if he were guilty of fraud upon his endorser, in procuring the note, which is not proved in this case, would make no difference in the principle above laid down. The land of the same debtor, from whom both parties derive their title, was still properly liable to this debt, and it would be too late, even for the debtor, to object to the judgment and execution, because he had his day before the tribunal which rendered the judgment, to make such

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defense. He would not be heard after the sale of his property, to make a question on that point. If this were not so, there would be no safety in purchasing at execution sales.

As Mr. Dice claims under a deed of trust made by Penn, after the levy in the other case, he stands in his shoes in this respect, and is equally precluded from making the objection. There are cases in which a purchase at a sale by a stranger to the judgment and execution, will get a good title, and the creditor in the execution would not. Such would be the case of a sale made under erroneous process. But that distinction has no application to this case. The process here, was not erroneous or irregular. The objection is not to the process, but to the title of the judgment creditor to the debt sued upon, on the ground, not that the endorsement was not made to him, but because he gave no consideration for it, or that it was fraudulent. There is, then, nothing fatal to the deed of Hughes in this objection. Nor is there any more, in our opinion, in the second point. It is the duty of the sheriff to levy executions on the personal estate, if any can be found, before he interferes with real estate. But it has never been held, that the omission of the sheriff to do his duty in this respect, will invalidate sales made by him, of realty. The title of the purchaser is good; the statute on that subject being only directory; but he is liable to the defendant in the execution.

This direction of the law is only intended for the benefit of the debtor, and as it is alone intended for the protection of his interest, no other person can take advantage of it, or sustain objection to a title derived under such improper levy and sale. But if this were

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otherwise, the proof in this case does not show that the defendant, Penn, had any personal property, known to the sheriff, upon which he could have levied. He proves that there was no personal property, unencumbered, known to him.

There is, therefore, no ground made out in this case, to justify the interposition of a court of equity, and the bill was properly dismissed.

We affirm the decree.

PARKER vs. CLAIBORNE.

GRANT. *Issued by the State of Kentucky for lands lying between Walker's line and the parallel of 36 deg. 30 min. north. Construction of the statutes of Kentucky of 1824, ch. 64, § 9; 1835, ch. 875, and 1836, ch. 271, § 1.* Though a grant, issued by the State of Kentucky for lands lying between Walker's line and the parallel of 36 deg. 30 min. north, embrace land which has its beginning corner within the boundary of the territory subject to be surveyed by the surveyor of one county, but yet extends into and embraces land in the district subject to be surveyed by the surveyor of another county, the grant is not, for that reason, void under the statutes of Kentucky of 1824, ch. 49, § 9, 1835, ch. 875, and 1836, ch. 271, § 1.

SAME. *Entry and survey.* Though an entry and survey be defective, yet a grant issued thereon will not, for that reason, be invalidated. In other words the court in an action of ejectment will not go behind the grant to examine into irregularities and imperfections in the mode of obtaining the grant.

This was an action of ejectment in the circuit court of Macon county. At the November Term, 1852, GOODALL, Judge, presiding, there was judgment for the plaintiff and the defendant appealed in error.

[Parker vs. Claiborne.]

M. M. BRIEN and W. F. EVANS, for plaintiff in error.

GUILD, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

This is an action of trespass, for injury to plaintiff's land. The object of the suit is to test the strength of title. An agreed case was made, which is as follows:

"It is agreed by the parties that the one thousand acre grant here filed, marked No. 1, under which the plaintiff holds title, has its beginning corner within the boundary of land subject to be surveyed by the surveyor of Allen county, Kentucky, but that the same extends over the line and covers the land for which defendant files grant No. 2, which is on the land in the district, subject to be surveyed by the surveyor of Monroe county, Kentucky. That the grants are each properly authenticated, and bear the date, as to their issuance, which they ought to do, and that each grant covers the land in dispute. If the one thousand acre tract is properly located, then the title is in the plaintiff, otherwise the title is in defendant, to the extent of his patent. The one thousand acre patent was issued 5th March, 1841, the patent of defendant, 22d March, 1851. The decision of the court as to the validity of the two grants is to settle the rights of the parties to this suit, as though the titles had been regularly de-raigned."

[Signed by the Attornies.]

The circuit judge, upon these facts, decided in favor of the plaintiff, from which the defendant appealed to this court.

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The only question is, whether according to the laws of Kentucky that part of the plaintiff's grant, which lies upon the land south of Monroe county, is not void, because of its contravention of an act of assembly of that State. This land lies in the disputed territory between the States of Kentucky and Tennessee.

When Kentucky constituted a part of Virginia, and Tennessee a part of North Carolina, the line between them was fixed at the parallel of thirty-six degrees and thirty minutes, north latitude. In 1779 and '80, commissioners were appointed by those States, to ascertain and mark that line for the purpose of avoiding mistakes and disputes on the subject of titles derived from the different States. These commissioners, after running about forty miles of the line, westward from the beginning, disagreed and separated. The Virginia commissioners, however, extended the line thus begun, west to the Tennessee river. The North Carolina commissioners returned and ran a line about two miles north of the other, about half the distance to the river, giving to North Carolina, (now Tennessee,) that much additional territory. The first of these lines was called Walker's and the other Henderson's line. So there was a conflict of power to sell and grant land, between the two States, on the whole length of this dividing line, over a territory of two miles wide. Each State proceeded to grant the same lands to the people, then forming settlements in the west. North Carolina, however, in 1790, receded from Henderson's and adopted Walker's line. But as this was after her cession of the territory now constituting Tennessee, to the United States, her confirmation was not binding on Tennessee. Afterwards in 1803, Tennessee and Virginia made a

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settlement of the dispute by running a line equi-distant between Walker's and Henderson's lines, and validating titles from either State before that time granted. But in 1819, Kentucky, disregarding this last settlement, caused a line to be run on the parrallel of thirty-six degrees and thirty minutes. This was found to be some distance south of Walker's line, and produced much confusion in the land titles, and great irritation on the borders of the two States. It now became necessary for decisive action by Tennessee, and the adoption of measures of peace, and a final settlement was the happy result. Each State appointed commissioners, who met and agreed upon, and signed a convention on the 2nd February, 1820, by which Walker's line was made the boundary, from the eastern terminus of the north boundary of this State, to the Tennessee river; and from that to the Mississippi river, the line of Alexander & Munsell was established. By the fifth article of this convention, the vacant and unappropriated lands lying east of Tennessee, and between the parallel of thirty-six degrees and thirty minutes and Walker's line, was made subject to the disposition of Kentucky, and her grants for the same were to be received as evidence of title in the courts of Tennessee; 2 Meig's Dig., 706. So, it will be seen, that by this compromise and arrangement, the sovereignty of Tennessee was secured to Walker's line, except the power to dispose of the vacant land, which was conceded to Kentucky.

Now, it only remains to be ascertained whether the one thousand acre grant, under which the plaintiff claims, is valid, to its full extent, according to her laws. The grant to Claiborne, of one thousand acres, begins south of Allen county, and passes over the dividing line into

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the territory south of Monroe, and for this reason, it is said to be illegal and void as to Parker, the defendant, whose land is all south of Monroe, though held by a younger entry and grant. The whole question, then, in the case, is, as to the validity of Claiborne's grant, upon the facts above stated.

The State of Kentucky passed an act as early as December, 1824, for the disposition of this land. In the ninth section, ch. 64, it is provided that "in performing the business of making the entries and surveys required by this act, they shall be bounded on the east and west by lines drawn at right angles from the extreme corners (in the State line) of these respective counties, south to the parallel of latitude of 36 deg. and 30 min. And it shall be no objection to an entry or survey, that it may begin in one of said divisions, and extend eastwardly or westwardly into another of said divisions of territory."

So it will be seen that, by this law, although the entries and surveys are directed to be made-all south of some particular county, yet it does not constitute an objection to them, that they may fall into two of the divisions, as is the case with the one thousand acre entry in question.

By an Act of 1835, ch. 875, the legislature gave the unappropriated land, north and east of the Tennessee river, to the respective counties in which they were situated, to such counties for the improvement of their roads and bridges. The power was given to the county courts to dispose of the lands, by entry and survey, and apply the proceeds as aforesaid. But still, grants were to be issued by the Register, and of course signed by the Governor, on such surveys. It is conceived

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that the only change made by this act, was to vest the proceeds in the respective counties; and provides that the entries should be made under the authority, and by the agency of the county courts, instead of the State.

By the Act of 1836, ch. 271, § 1, the said vacant lands south of Monroe county, are given to her to improve her roads; and by the fifth section, those south of Allen, to her for the same purpose. Yet, the Register of the land office is to issue patents to enterers, as before. Now, from these acts, it is argued that inasmuch as the proceeds of the lands south of each county, must go to that county, that an entry beginning south of one, and extending into the territory south of the other, would be void, because the proceeds are appropriated to each; and this cannot be done, it is contended, if the same entry lies partly on the territory of both.

We cannot recognize the validity of this objection. The Act of 1824, ch. 64, § 9, first above referred to, has never been repealed; and that expressly allows, or at least saves from invalidation, this kind of entry. The main object of the subsequent acts, is to dispose of the proceeds to the counties for a particular purpose. The only question that could arise, would be, as to the price of the land. Allen and Monroe counties would be entitled, respectively, to the proceeds of that portion of the land embraced in said grants, which lay in the territory set apart to each. Taking all the acts together, they do not interfere materially with each other, and can all well stand together.

We know of no principle which would authorize us to take into view the misapplication of the proceeds of

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land regularly entered and granted, in testing the validity of the titles. This would be unprecedented.

But, upon another ground, this title cannot be thus impaired. The grant is signed and issued by the Governor, under the great seal of the State, to the land then vacant; and in a contest with a younger enterer and grantee, it cannot be assailed by any defects that may have existed in the entry and survey. If any such exist, they are cured by the grant. In other words, we cannot go behind the grant, in cases like this, to search out irregularities or imperfections. The title stands upon the strength of the grant made by the sovereign authority of the State.

So, upon these grounds, we arrive at the conclusion that the older grant of Claiborne, for one thousand acres, must prevail over that of Parker, the defendant, for one hundred and twenty-seven acres, which is ten years younger.

Let the judgment of the circuit court be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE
FOR THE WESTERN DIVISION.

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**JACKSON: APRIL TERM, 1852.**  
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SMITHWICK & Co., vs. ANDERSON.

WITNESS. Endorser. Competency. In an action upon negotiable paper by the endorsee, against the maker, the endorser, [unless on some other account he is disqualified,] is a competent witness for either party, if he has endorsed it when over due or if, by the laws of the State in which the paper was negotiated, the maker may, in an action against him upon the paper, resist a recovery by an endorsee, upon the ground of want of consideration, or fraud, in the making of the paper.

DEPOSITION. Exceptions to, by the party who has taken it. If a witness, in reply to an inquiry of the party who is taking his deposition, answer the question, and add statements which are not necessary to be made, as a part of his answer, and which would be illegal if offered as evidence by the opposite party, the party taking the deposition may, on the trial, have that portion of it excluded from the jury.

This was an action of debt in the common law and chancery court of the city of Memphis. At the November Term, 1852, HARRIS, Judge, presiding, there was

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judgment for the defendant, and the plaintiffs appealed in error.

RICHARDSON, for plaintiff in error, cited Chitty on Bills, 7th Am. Ed., 417; 1 Greenleaf on Evi., § 384; Bayley on Bills, 2 Am. Ed., 394; *Bailey et als. vs. Cochran et als.*, 5 Humph., 401.

J. P. CARUTHERS, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

The note under seal sued upon was given by the defendant to B. C. Hurley, for three hundred dollars, in March, 1849, due the next October. It was endorsed to the plaintiffs in May of the same year. The consideration was the donation right to nine quarter sections of land in the State of Arkansas, of which a conveyance was made at the same time. The trade was made, and the note executed and endorsed in the State of Mississippi. The defense set up to the note by plea was, that fraudulent misrepresentations were made about the land, and that the consideration was entirely worthless. The verdict was for the defendant and the plaintiffs appeal from the judgment of the court overruling their motion for a new trial, and other errors on questions of evidence in the progress of the trial.

The first objection, is that the court rejected the deposition of the endorser, B. C. Hurley, upon the ground that he was an incompetent witness for the plaintiffs. In this we think there was error.

The contract having been made, and the note endorsed, in the State of Mississippi, the rights of the parties

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must be determined by their local laws. By them the maker of a note, bond, &c., for the payment of money &c., has a right to any defense against the endorsee, that he could have against the endorser or payee, on the ground of failure of consideration, payments, offsets, &c., which existed previous to notice of the assignment; Hutchinson's Miss. Code, 641. A suit is also given to the endorsee against the endorser as in cases of inland bills of exchange. The only change here made in the general law, is to let in the same defenses on the part of the maker of a note or drawer of a bill, in the hands of an endorsee, that might be made against the payee, except such as may have originated after the maker had notice of the assignment.

This was the law before, except in cases of endorsements, before the paper was due, without knowledge of the existence of the defense. And the only change made, was, to put all such negotiable paper, whether or not, upon the same ground, and subject it in the hands of an endorser, to all the defenses that could have been made before, in cases where the paper had been assigned after due or the suit was by the payee himself. The Miss. act of 1822, ch. 59, § 58, *Ib.*, 847, only places notes under seal, upon the same ground as those unsealed, as to the impeachment of the consideration.

The note, in this case, was assigned to the plaintiff before maturity; but still, under the statute referred to, as this contract, as well as the endorsement, were made in Mississippi, the defendant had a right to set up and insist upon the failure of consideration. But we cannot see what that had to do with the questions raised by this record. They do not arise upon the matter of the

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defense and the issues to be tried, but the admissibility of a witness, and the competency of evidence under the issues. It is not controverted, that the defendant had a right to shew a failure of consideration, but that he cannot do it by the endorser. This raises a question which has been much debated in England and in this country, and on which the decision, there and here, have been conflicting and contradictory. We are not aware of any conflict between the laws of Mississippi and Tennessee, on this point; none has been shewn. It stands upon a general principle, common to both, and all the States. And as to the competency of an endorser, in a contest between the endorsee and maker, or another endorser, there is great conflict of authority, both in England and America, in some aspects of the question.

In *Walton vs. Shelley*, 1 Term. Rep., 296, an endorser was held inadmissible upon general grounds of public policy, to prove the note void for usury in its original concoction, in a suit by an innocent holder. Lord Mansfield there says, it is "of consequence to mankind, that no person should hang out false colors to deceive them, by first affixing his signature to a paper, and then afterwards giving testimony to invalidate it." But in *Jordain vs. Lashbrooke*, 7 Term. R., 599, Lord Kenyon, giving the opinion of the whole court, reviews and overrules that case, and declares such a witness admissible, and states that the objection that he swears that to be false, which he holds out to the world to be true, by his signature, goes only to his credibility with the jury. The doctrine of this last decision, still prevails in England, and some of our States.

Mr. Greenleaf, § 385, upon a review of the authorities, comes to the conclusion, that in this country, it is settled

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by the weight of authority, "that the endorser of a negotiable security, negotiated *before* it was due, is not admissible as a witness to prove it originally void, when in the hands of an *innocent* endorsee." This principle is sustained by an unbroken current of decisions in the supreme court of the United States; *Bank of the U. S. vs. Dunn*, 6 Peters, 51, 57; *Bank of the Metropolis vs. Jones*, 8 Peters, 12; *United States vs. Leffler*, 86, 94, 95; *Scott vs. Loyd*, 12 Peters, 149; *Henderson vs. Anderson*, 3 Howard, 73. Most of the States have concurring decisions. But the contrary, that is, that an endorser is a competent witness even to impeach the note in the hands of an innocent endorsee, is holden in some of the States, whose decisions are in general, received with the highest respect. The same author, in the first volume of his treatise on evidence, in a note at page 487, says, all these latter decisions against the rule in *Walton vs. Shelley*, except that in New Jersey, and the last case in New Hampshire, were made before the rule was adopted in the supreme court of the United States. It will be observed, that the contest has been to limit the general admissibility of the endorser as a witness, his competency not being otherwise brought in question. This exception is founded on public policy connected with the trade and commerce of the country. To this end, it is deemed of the highest importance to promote, and preserve the credit, and free circulation of negotiable paper. This would be seriously affected if a party upon it, were permitted to invalidate and destroy it, after sending it forth into the channels of trade, with the stamp of his signet upon it. He shall not be heard to say, to the injury of an innocent holder, any thing that would contradict the

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necessary inference from his endorsement, that the paper is genuine, worthy of all credit. This rule is, however, limited to cases where the paper is negotiable, and has been transferred before due to one innocent of any objection which should dishonor it. If past due it stands dishonored already, and the reason does not apply.

With this limitation and exception, an endorser is a competent witness in a suit by the holder, against another endorser, or against the drawer or maker for either party, unless he is, on some other account, disqualified. He is, of course, subject to the same objection as any other witness, on other general grounds. If he be interested in the event of that suit, he is incompetent. But, in general, the interest will be found equal, on both sides; and in cases where the interest of a witness is equally balanced, he is admissible for either party; 1 Greenl., §§ 399, 420. It is not enough that the endorser, by defeating the action then pending, may *probably* save himself from an action; this only goes to his credit; *Ib.*, § 400. This author, in the same section, lays the law down broadly to be, that "in an action by the endorsee against the drawer or acceptor, the endorser is, in general, a competent witness for either party." This court, in the case of *Bailey & Cochran vs. Cooper*, et als., 5 Humph., recognize, in general terms, the same rule.

In the case before us, the witness, Hurley, would be liable to the plaintiff on his endorsement, if he had been legally notified of demand and refusal, which might *probably* have subjected him to a suit, in case of failure of that suit against the maker; but then, on the other hand, if the plaintiff succeeded, and the defendant had the money to pay, the witness would be liable to him for the amount recovered on account of the failure or fraud in

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the original consideration. So, here was a case of balanced interest; and consequently, there is no ground of objection on that score. By reason and authority, then, we are brought to the conclusion that an endorser is a competent witness for either party, with the exceptions before stated.

2. The plaintiff had taken the deposition of M. B. Peterson, to whom he propounded this interrogatory: "Did you ever present said note to defendant, or tell him you had it; and if so, what did he say; and when did you present said note to Mr. Anderson for payment?"

The witness answered it, stating the fact that he had called upon defendant with the note, to which he made no objection, and promised to pay it as soon as he obtained returns from the sale of some cotton. But the witness went on to say, that some time afterwards he met with the defendant, who introduced the subject himself, and said he would not pay the note; that he had been to see the land, and it was entirely valueless, and a fraud had been practiced upon him in the sale by Hurley.

This last part of the deposition was proposed by the plaintiff to be stricken out as inadmissible evidence, and not responsive to his question. This the court refused to do, and required the whole deposition to be read to the jury as evidence.

This question came before us at the last term at Nashville, and we decided, upon full consideration, that it was competent for a party who had taken a deposition, into which illegal or incompetent matter had been voluntarily introduced by the witness, to strike it out, on motion, and exclude it from the jury.

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The statements of a party would be admissible evidence for him, if drawn out by the opposite party; but not so, if thrust into the answer of a question to which they are not responsive. Here, the question called for what was said by the defendant, on the presentation and demand of the note, and not at any other time. All he said at that time, would be evidence for, as well as against him; but the answer could go no further than the question, in legalizing matter, which would be inadmissible, unless it were called for by the party, or was fairly embraced in his interrogatory. The court, therefore, erred in not sustaining the motion to strike out this part of the deposition, and compelling the plaintiff to read it to the jury.

For these errors, the verdict will be set aside, and a new trial granted.

ALFRED and ANTHONY vs. THE STATE.

CRIMINAL LAW. Jurors. Competency. The mere fact that a person has an opinion; has "made up his mind;" as to the guilt or innocence of the prisoner, does not render him incompetent as a juror; as it is not the existence of the opinion, either way, which constitutes the disqualification, but the grounds upon which it is formed. Hence, upon a trial of two slaves who were charged with the murder of their master, persons were held to be competent jurors, one of whom, upon the trial of his competency by the court, stated that "he had heard that Peck's negroes had killed him; that he believed it, and does now; and could not do otherwise, as he had the evidence of the country. And on the facts aforesaid, he had formed an opinion which he now entertains. That it was upon rumor he formed this opinion. That he has a bias upon his mind, and has had it ever since, from these circumstances;" and the other of whom stated that "he had formed an opinion upon mere rumor; that the rumor was the common chat of the neighborhood that Peck's negroes had killed him; that he believed the rumor then and now; and upon it formed his opinion which he now entertains."

EVIDENCE. Examination of prisoners by a committing magistrate. If a prisoner be cautioned by the committing magistrate that whatever he may say, upon his examination by the magistrate, may be used against him, and that he is not bound to criminate himself, but that it is his privilege to submit to an examination or not, at his option; then the confessions made by the prisoner, which are reduced to writing by the magistrate, may be read as evidence against the prisoner upon his trial; subject to be impeached, however, as is other testimony.

The prisoners, two slaves, were indicted and convicted of the murder of their master, at the February Term, 1853, of the circuit court of Weakley county, FITZGERALD, Judge, presiding. From the sentence of death pronounced upon them, they appealed in error.

I. R. HAWKINS and B. F. LAMB, for the prisoners.

ETHERIDGE, MORRILL and ATTORNEY GENERAL, for the State.

CARUTHERS, J., delivered the opinion of the court.

At the February term, 1852, of the circuit court of Weakley county, Alfred and Anthony were indicted for the murder of their master, John Peck. The case was

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continued by defendants, at February and June terms, and in October there was no court. They were tried and convicted at February term, 1853; motion for a new trial was made and overruled, and appeal in error to this court.

The errors relied upon for a reversal, are said to exist in the judgments of the court, as to the competency of jurymen, and the admissibility of evidence on the trial. The sufficiency of the evidence to sustain the verdict, if legal, and the correctness of the charge of the court, are not controverted.

First, as to the jurymen. Thirteen cases are presented in the record, the last one, after the defendants had exhausted their seventy peremptory challenges, all of which, it is contended, were incompetent, according to the tests heretofore prescribed by this court, in various cases, and particularly in *Moses vs. The State*, 10 Humph., 456-460; and in 11 Humph., *Moses vs. The State*, 232. These being the most recent cases in which all the former decisions are reviewed, and the rules laid down well considered, the ruling of the court below, in this case, must be tested by them.

By these decisions, we consider it to be well settled, that the mere fact that a person has an opinion; "has made up his mind;" as to the guilt, or innocence of the prisoner, does not render him an incompetent jurymen. The rule is, that it does disqualify him:

First: Where it is formed upon his own knowledge of the facts, or a statement of them by the *witnesses*, or others *professing* to know the circumstances.

Secondly: Where the opinion is entertained, but from the examination, it is left doubtful whether it is formed as above stated, or not.

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But if formed from *rumor, or report*, it does not disqualify him.

In the first case, it is considered, as stated by the court in the case in 10 Humph., 458, that this opinion is formed upon a rational ground of belief; but in the last, it can only be regarded as a vague impression, having no reasonable foundation to rest upon.

The reason for the distinction, is thus given by the court in that case: "In the former case, the juror will not be admitted, because the law supposes that his judgment may be improperly influenced, perhaps unconsciously, by the opinion which pre-occupies his mind, and that he is incapable of weighing the evidence with that perfect fairness and impartiality, which might reasonably be expected from one who enters the jury box, with no preconceived, fixed opinion. But in the latter case, there is no previous, fixed opinion, requiring the force of countervailing evidence to displace; and there is no sufficient reason to distrust the capability of the juror to do impartial justice to the accused."

So, it will be seen, that it is well settled, both by reason, and the positive rules laid down, that it is not the existence of an opinion, either way, which constitutes the disqualification, but the grounds upon which it is formed; or, it might be speaking more correctly to say, that the law does not regard it as an opinion at all, unless it is based upon a knowledge, or reliable information of the facts.

Now, upon this part of the case, it only remains to be examined, whether, under these rules, the circuit judge erred in deciding that the jurors in the present case, in view of the facts set forth in the bill of exceptions, were competent, and should be put to the prisoners.

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It is unnecessary to notice each of the thirteen cases, as they are all very nearly alike, being opinions formed from rumor with but little variety of statement. A few of the cases, two only, will be copied from the record.

"N. Pate stated that he had heard that Peck's negroes had killed him, that he believed it, and does now, and could not do otherwise, as he had the evidence of the country. And on the facts aforesaid he had formed an opinion, which he now entertains. That it was upon rumor he formed this opinion; that he has a bias upon his mind, and has had it ever since, from these circumstances."

"G. W. Simpson, that he had formed an opinion upon mere rumor; that the rumor was the common chat of the neighborhood, that Peck's negroes had killed him; that he believed the rumor then and now, and upon it formed his opinion, which he now entertains."

These are considered the strongest cases. If *they* were competent, all the others were clearly so. And we are of opinion that they were competent, and qualified jurors, according to the legal tests established by the decisions of this court in former cases, and set forth above in this opinion.

Pate had formed an opinion, then entertained it, and had "a bias upon his mind." But he expressly states that this opinion and bias, were produced by, and rested entirely upon "rumor," upon "the evidence of the country." That is, it was the general belief of the people that Peck's negroes killed him, and on that account he believed it. Is not this the most vague and unsubstantial ground upon which an opinion could be based? Can it be for a moment supposed that it could have the weight of a feather upon the mind of any

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rational man, duly sworn to perform a solemn duty, involving the life of a fellow creature? He had heard no facts and circumstances, from "witnesses or any other person professing to know them," but he grounded his opinion upon rumor, and the general talk of the country.

In the case of *Moses*, 10 *Humph.*, in which the court go a step beyond any previous case, and establish a new rule, or rather a qualification of the old one, to-wit: that if it be doubtful, from the examination, whether the opinion is formed on rumor or not, the juror should be rejected; the juror was asked by the court "if his information was from any of the witnesses, or persons who knew the facts;" and he said he "did not know, or even know the witnesses in the cause." Although he had first said he had from rumor formed his opinion, yet, when he came to be further examined, he said he did not know, but left it to be inferred that he might have heard the witnesses. So, it was upon this uncertainty as to the grounds of his opinion that he was declared incompetent. But here, there is no uncertainty. The juror expressly declares that "it was from rumor he formed this opinion." He says, in effect, he could not do otherwise than believe that Peck's negroes killed him, because such was the general belief of the country. Not that he had heard any of the circumstances, or what evidence existed, or whether any, but that it was so rumored and reported in that neighborhood, and therefore, he believed it.

An opinion thus formed, we can only regard as a mere hypothetical opinion, or vague impression, having no reasonable foundation to sustain it, and not at all calculated to prevent a free investigation of truth, and the render-

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ing of an impartial verdict according to the evidence and the law.

To the other jurymen, there can be no objection, unless it be that the opinion formed from rumor "he now entertains." We do not believe that the fact that the opinion is still entertained, makes any difference. That is not incorporated as an element in the rule. It is immaterial whether the opinion has been changed, or still remains, provided it is formed on mere rumor. It is not regarded by the law as an opinion, but a mere impression which will present no obstruction to the force of evidence and power of truth.

We think that this court has heretofore gone far enough for all the purposes of justice, in granting new trials, upon objections of this kind, to the action of circuit judges, and we are not disposed to make the tests more stringent. Yet, we do not disapprove, or intend to depart from the rules which have been settled in former cases, as we understand and now explain them. The constitutional right of every citizen, to have "a speedy public trial by an impartial jury," should be carefully guarded, and firmly sustained by the courts. It must not be infringed, on any account. The most perplexing difficulties have arisen on this subject, in the empannelling of juries. It is often exceedingly difficult to apply any rule which will enable the judge to clearly draw the line, between an opinion which will leave the jurymen partial and biased, inclined to one side, and that which is so insubstantial as to leave him "impartial," and capable of weighing the evidence in even scales, and forming a fair and impartial judgment. To free the subject, as far as possible, of its inherent difficulties, the rules before stated, have been established upon great consideration, in

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former cases, and we now do nothing more than to test the cases before us, by them. Rules more relaxed, would render it almost impracticable to get a jury in any county where a great and notable crime, like the one now charged, had been perpetrated. In such cases, it cannot be expected that the tongue of rumor will be still, or that the public mind will remain quiet. Experience and observation prove, that, in all such cases, the stories which float over the agitated sea of the public mind, are as numerous as they are unreliable; and it cannot be presumed that any "good and lawful citizen" will permit an opinion formed upon such stories and rumors, to influence his judgment in the jury-box, sitting upon the life or liberty of a fellow-being, under an oath to decide upon the law and evidence, as they shall be delivered to him, by the court and witnesses. The rule itself, which excludes for a formed opinion, is founded upon the frailty and imperfection of human nature. It is grounded on the apprehension, that the belief which exists in the mind, will disincline the juror to yield to the weight of any evidence tending to produce an opposite belief. This bias, it is supposed, may result, either from natural infirmity, or the law of mind, which would be innocent and faultless; or it may proceed from pride of opinion, or prejudice, which would be highly reprehensible. But all these considerations have had their due weight in the establishment of the rule, and its limitations. With these, as they stand, and are stated above, we are content, but not inclined to go any further in staying the sword of justice, after trial and conviction, on objections of this character; the effect of which, if carried further, would be, in a majority of cases, to favor the escape of the guilty,

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or to protract and increase the burthen of criminal proceedings, rather than promote the ends of justice, or the protection of the innocent.

The second question raised, is upon the admissibility of evidence, as to the confessions of the defendants.

It is not controverted by the Attorney General that the confessions made previous to the investigation before the committing court, were attended by such circumstances, as to render them incompetent. So ruled the court below, and the only objection is, that they were permitted to go to the jury. We cannot sustain this objection. The court expressly stated to the jury that the evidence was illegal and must not be regarded by them. But confessions of the defendants were taken down by the committing magistrate, on their examination before him, and this was admitted as evidence to the jury against the objection of defendants' counsel. Was this legal evidence?

By the act of 1715, ch. 16, § 1; Car. & Nich., 426, it is made the duty of the magistrate to "record the examination of the party" who is brought before him on any criminal charge, as well as "the full matter given in evidence both against and for him, with all concurring circumstances. * * which examination so taken shall be returned to the office of the court wherein the matter is to be tried under the penalty," &c. For what purpose is this required to be done? It cannot be used as evidence for him, unless it is made so by the State, as we decided at last term at Nashville, in the case of *Nelson vs. The State*, because he cannot be allowed to make evidence for himself. But if he be cautioned by the magistrate that whatever he may say may be used against him, - and

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that he is not bound to criminate himself, but that it is his privilege to submit to an examination or not, at his option, there certainly can be no good reason why any statements or confessions he may make under such circumstances should not be good evidence against him. It would seem absurd to allow admissions and confessions freely made, to be proved by witnesses who heard them, and exclude those made in like manner and written down at the time by a sworn officer of the law. A confession made before the magistrate, as well as any where else, under the flattery of hope or the torture of fear, under the influence of promised favor or dreaded injury and harm, come in too questionable a shape to be entitled to any credit, and are consequently improper evidence. This examination of one accused of crime is considered as a privilege in his favor. It is offered by the law to enable him, if innocent, to clear himself of suspicion. This he may sometimes be able to do by the developement of circumstances which will dispel the clouds which seem to hang over him, and thus secure his discharge. He may disclose his defense, remain silent, or if his guilt bears heavily upon his conscience, make a full confession of his crime. There is no coercion; it is free and voluntary, and under a full knowledge of his rights, if the magistrate does his duty, as was done in this case.

The statutes of 1 and 2, Phil. and Mary, ch. 13, § 4; and the 2 and 3, of the same, ch. 10, are very similar to our act of 1715, on the same subject. The practice of the English courts, under those acts, as set forth in 1 Chitty's Crimi. Law, 75 to 88, sustain the positions we now lay down, as the law of this State.

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If the confession is written down by the magistrate, that is the proper evidence, and the particulars of such examination, it seems, cannot be given in evidence, *viva voce*, but this can only be done where it is proved that it was not committed to writing; 1 Chitty's Crim. Law., 87. This, of course, is impeachable, like any other evidence, by the defendant.

In the case before us, we think the confessions were freely and voluntarily made, under proper cautions from the examining justice, and written down in due form. They were properly admitted as evidence to the jury, and were amply sufficient to establish the guilt of the prisoners, beyond all doubt. There is no conflicting evidence; nothing to impair their force, or to excite the least suspicion of their truth.

There being, then, no error in the proceedings, and judgment of the court below, we affirm them.

McKINNEY, J., dissented.

STEWART vs. STEWART.

DIVORCE. *Act of 1835, ch. 26, § 1.* To authorize a divorce for the cause stated in the Act of 1835, ch. 26, § 1, it must be averred in the petition and verified by proof, that the desertion or absence of the party, against whom the complaint is made, is wilful and malicious, and without reasonable cause. The malice intended by the statute, is not malice *in law*, but malice *in fact*; that is, an enmity of heart, or unprovoked malignity toward the person deserted, and there being no other cause, this state of mind prompts the desertion or absence.

This was a petition filed in the circuit court of Carroll county, by John Stewart, against his wife, Mary Stewart. The petition, upon the proof, and for the reason stated in the opinion, was dismissed, FITZGERALD, Judge, presiding, at the December Term, 1852; whereupon, the petitioner appealed.

A. HAWKINS, for the petitioner.

TOTTEN, J., delivered the opinion of the court.

Petition for divorce. The petition states that the parties were married in 1849, and continued together until April, 1850, when the defendant, "*without any just or probable cause*," abandoned the home of defendant; has continued since to absent herself from his bed and board, and refused to return and live with him, for reasons wholly unknown to the plaintiff. The petition was heard upon an order *pro confesso* and proof. Two witnesses prove that defendant abandoned the house of the plaintiff more than two years before the petition was filed, but remained and resided in his vicinity; that they were acquainted with the parties before the separation; were often at their house, and did not know or hear of any

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unkind treatment by the husband to the wife. His honor, the circuit judge, dismissed the petition, and the plaintiff appeals to this court.

1. By the Act of 1835, ch. 26, § 1, a cause of divorce *a vinculo*, is, the "wilful and malicious desertion or absence by the husband or wife, without a reasonable cause, for the space of two years."

It is insisted that the present case comes within this provision. We do not think that it does, either in its *averments* or *proof*. The cause for divorce must be well averred in the petition. We do not say in the very words of the statute, but in words fully equal and definite in their meaning. If this be not done, the proof becomes irrelevant and useless, and no decree for divorce can be made.

The cause declared by the statute is, a wilful and malicious desertion, or a wilful and malicious absence; and it is added, without reasonable cause. The language is strong and definite, and states a precise case intended to be made a cause for divorce. It implies a wilful and obstinate desertion, not only without any reasonable cause, but *for cause of malice*. The word *malice*, in this connection, is not used to signify a wicked and perverse disposition in a general sense, but the actual state and disposition of mind at the time of the desertion and continued absence. Or, in legal phrase, it signifies not malice *in law*, but malice *in fact*; 2 Stark Ev., 905.

Now, in this sense, the malice implies enmity of heart, or unprovoked malignity toward the person deserted; and there being no other cause, this state of mind is the cause of the act done. The law intends that in such case, of causeless and irreconcilable hatred, a re-union of the parties is neither possible nor desirable; and that it

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is but just, that the injured party be released from the unhappy connexion.

Now, in the present case, the averment is, that the desertion was "without any just or probable cause;" that is, it states negatively, that there was no cause for the desertion. But we have seen that that is not a ground for divorce; for, it must also appear, and of course, must be averred, that the desertion or absence was for cause of malice. This must be the motive which induced the desertion, and it is to be inferred, from all the facts and circumstances in the case.

2. But if the petition were perfect, and stated a sufficient cause for divorce, we do not think that any such cause appears in the proof. It is evident that it is imperfect, and does not exhibit the whole case. The facts and circumstances which attended the separation, and followed it, are not stated or alluded to. It merely appears, that the separation occurred, and that it continued for more than two years. It is true, the witnesses say they were not aware of any unkindness or mal-treatment on the part of the husband toward the wife; but this is merely a negative statement, from which no material inference can be drawn.

It is said in the petition that she refused to return; but it does not appear that he desired her to return, or in any manner endeavored to procure a reconciliation and re-union. From anything that appears, he may himself be at fault. If the separation occurred from some temporary cause or disagreement, which may be removed or reconciled by a proper exertion, and it does not appear but that such may be the present case, it is clear that that is no ground of divorce; for it is a duty which the parties owe to themselves, their children and society,

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to be reconciled, and to live together. The public cannot consent to their separation, except for the grave cause stated in a former part of this opinion; and that must be made fully to appear in the proof.

Let the judgment be affirmed.

HURST *vs.* MEANS.

SALE OF LAND. *Vendor refusing to make title. Action.* If the vendee of land, to whom the vendor agrees in writing to sell and convey, enter into and retain the possession of the land until the time of bringing his action, he cannot, upon the refusal of the vendor to make title, maintain an action for money had and received, against the vendor for so much of the purchase money as he has paid to him under the agreement. Such action can only be maintained when the agreement is void, or the vendee takes no benefit under it.

This was an action of debt, commenced in the common law and chancery court of the city of Memphis. At the March Term, 1852, HARRIS, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

E. M. YEEGER, for plaintiff in error, argued: A party who contracts to sell land, should have the legal title, or the means of enforcing it. If he has not, the vendee has a right to disaffirm the contract; and if he has paid any part of the purchase money, he can receive it back in an action for money had and received; *Pipkin vs. James*, 1 Humph., 325; *Clarke vs. Locke*, 11 Humph., 300.

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And in case he elect to disaffirm it, he need not perform, or tender performance on his part; *Clarke vs. Locke*, 11 Humph., 300.

So, when the vendee has paid any part of the purchase money, and the seller does not complete his agreement, and the contract is totally unexecuted, the vendee may disaffirm it *ab initio*, and bring an action for money received to his use; Sugden on Vendors, 234; 1 Cain's Rep., 47; 5 Johns., 85.

I am strongly inclined to the opinion, that the vendor must have the right to enforce the legal title, at the time he contracts to sell. It will not do that he has a title bond to convey to him, upon the payment, by him, of the purchase money, no part of which has been paid. Under such circumstances, he has not the means of enforcing the legal title. It is a mere attempt at speculation upon other person's property, in which he has no right or interest; the doing of which is strongly reprobated in the case of *Pipkin vs. James*, 1 Humph., 325. And in 6 Barn. & Cress., 31, where a person who had contracted for the purchase of an estate, but had not obtained a conveyance of it, sold it with a stipulation to make a good title, which he was unable to do, as his vendor refused to convey, Lord Tenderdon said: "He should not have taken such a step, without ascertaining that he would be in a situation to make *some* title; and having entered into a contract to sell, without the power to confer, even the shadow of a title, he must be responsible for the damage sustained by a breach of his contract."

And, inasmuch as the vendee has his election to sue for damages, for a breach of the contract, thereby affirming it; or for the recovery of the purchase money he

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has paid, thereby disaffirming it, it would be but reasonable to hold, that in the above, and in all cases, where the vendor sells without having a legal title, or being in a situation to make *some* title, he would be liable in an action for money had and received, although he had made a contract to purchase. The true doctrine undoubtedly is, that he, the vendor, at the time he contracts to sell, should have it in his power to compel a conveyance to himself, and transmit the right to his vendee, as would be the case, where he had paid the purchase money. See Sugden on Vendors, 207, 208, and cases cited.

SWAYNE and SULLIVAN, for defendant in error, argued: Plaintiff has not disaffirmed his contract with Means; but, on the contrary, by taking possession under the contract, and by retaining the possession *up to the present time*, he has elected to affirm the contract; and having done so, he must sue on that contract; 2 Saunders' Pl. and Evidence, title, *Vendee vs. Vendor*, p. 908, and 910; Chitty on Contracts, 741, 742, 743; 1 Chitty's Pl., p. 355.

Where there is a special contract subsisting, the plaintiff must sue on it. In this case, there is such a contract in full force. The plaintiff is in possession of the land under the contract, and has, for ten years, had such possession, receiving the rents and profits. This is, itself, an affirmation of the contract; 5 East, 449; 6 Cowen, p. 1; Chitty on Con., 188; 5 Humph.. 562; 2 Greenleaf's Ev., 114; 4 Blackford, 515.

An action of *indebitatus assumpsit* will lie to recover back the consideration paid on a *void contract*, for the sale of real estate, but it will not lie to recover back

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the consideration money, when there is a special *written* contract subsisting. The case of *Pipkin vs. James*, 1 Humph., was a *parol* contract; it was void, and in such case the action may be sustained without a rescission, because there is no contract to rescind. The case of *Given vs. Locke*, in 11 Humph., was covenant on the contract; thereby affirming it. It was not similar to this case.

TOTREN J., delivered the opinion of the court.

The action is debt for four thousand five hundred dollars, alleged to be money had and received by defendant for the plaintiff's use. The defendant pleaded *nil debet*. There was judgment for defendant, and plaintiff has appealed in error to this court.

The facts are these: "In October, 1842, the defendant sold to plaintiff a section of land in Marshall county, Miss., for three thousand five hundred dollars, payable in three instalments. At the same time, the plaintiff was admitted into possession of the premises, under the contract, and had so continued ever since, by himself or tenants, so far as appears in the record. He made considerable payments on his contract; the precise amount does not appear. He offered to pay the balance if defendant would make title to the land. The legal title was not in defendant, but in the trustees of a land company, with whom defendant had made an agreement, in writing, for the purchase of said land. He had not, and has not paid the purchase money to said trustees, who, of course, refused to make title; and so defendant was not in condition to make title to the plaintiff, when it was demanded of him, as before stated. The object of

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the suit is, therefore, to recover from the vendor money paid to him on an agreement for the sale of land, upon the ground that he has failed to execute the agreement, and is unable to execute it, for want of title in himself, or the means of procuring it of the person in whom it is vested.

The rule on this subject, is stated in *Clarke vs. Locke*, 11 Humph. R., 300. If the vendor, on a proper demand made, refuse, or be unable to execute his contract, the vendee may bring his action thereon for the recovery of damages, thereby affirming the contract; or, at his election, may disaffirm the contract *ab initio*, and sue for money had and received to his use.

In the present case, the vendee has elected to disaffirm the contract, and to sue for a return of his purchase money. This, it was competent for him to do; and the question is, do the facts in this case amount to a disaffirmance and rescission of the contract? We are of opinion that they do not.

It is a valid contract in writing, and was in part executed by the vendor; for, he placed the vendee in possession under it. This possession has not been restored, but continued in the vendee at the time this suit was instituted. The vendee pretends to disaffirm and rescind the contract, and yet holds the possession, a benefit, under it. It is in this respect, that the contract is not rescinded; and the action can only be maintained upon its absolute and total rescission. It would be unreasonable and unjust to permit a purchaser to retain the possession and use of the thing purchased, and yet to recover back the consideration as for a defect of title. The action for money had and received, is, in its nature, equitable; and it cannot be maintained upon a

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principle so unequal and unjust. When a contract is properly rescinded, the parties are placed *in statu quo*; 5 East, 449; 15 Petersd. Ab., 307, note; 2 Phil. Ev., 89; *Weston vs. Downs*, Doug. 23; *Ellett vs. Maynard*, 5 T. R., 87; *Towers vs. Barrett*, 1 Term. R., 133; 6 Blackford's R., 22; 2 Saund. on Pl. & Ev., 908.

Where, however, the contract is void in itself, no act of rescission is necessary, in order to maintain the action for money had and received upon it. No right or duty can be predicated upon a void contract; it is the same as if it had not been made. Therefore, if a party enter upon land and pay money under a parol contract, for its purchase, he may recover it back, by action for money had and received for his use, without restoring the possession or doing other acts to rescind the contract; for, the contract never had a legal existence, and, of course, no action could be maintained upon it; *Walker vs. Constable*, 1 B. & P., 306; *Beckerman vs. Kuykandol*, 6 Blackf. R., 22; *Pipkin vs. James*, 1 Humph. R., 325.

But here, the contract being in writing, was valid as between the parties, and the possession was retained by the purchaser. In such case, the present form of action cannot be maintained.

Let the judgment be affirmed.

SAMPSON *vs.* Lessee of UNIVERSITY OF NASHVILLE.

LIMITATION OF ACTIONS. *Lands reserved for the use of schools. Colleges. Act of 1819, ch. 28.* The proviso to § 3, act of 1819, ch. 28, declaring "that this act shall have no bearing on the lands reserved for the use of schools," does not prevent the bar of the statute as to lands held by colleges, which were not reserved for their benefit, under the act of Congress, of 1806, ceding lands to the State of Tennessee, for the use of colleges, academies and schools.

This was an action of ejectment in the circuit court of Dyer county, brought by the lessee of the University of Nashville, formerly Cumberland College. At the October Term, 1852, READ, Judge, presiding, there was judgment for the plaintiff, and the defendant appealed in error.

F. G. SAMPSON, for plaintiff in error, argued, that the land sued for in this action, was not embraced within the saving of the proviso to section 3 of the act of 1819, ch. 28, for these reasons:

1. These lands are spoken of by the term, "the lands;" clearly intending to embrace that *particular class* of lands in the Hiwassee district, which were, previous to 1819, reserved by the State, and known as school lands.

2. They are described as lands "reserved," and certainly not intended to include those lands *granted* by the State. In the one case, the title is reserved in the State; in the other, it is granted out from the State, to individuals.

3. They are described as lands "reserved for the use of *schools*," while in our acts of assembly, and constitution, as well as in common English, we never use the simple word, schools, to include colleges and universities. They are different and distinct institutions, and

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hence, were not intended to be included in the term, schools.

4. This saving was made with a view to a particular description of lands, then in being, and certainly could not be intended, by a "prospective sweep," to include lands of a description, at that time unknown to the law.

5. The reason of this proviso, was in the maxim, "*nullum tempus occurit regi*," that the statute should not run against the State. But when lands have been granted away to individuals, it is their duty to guard and protect them. They cease then, to be the objects of the State's protection; and if the grantees sleep upon their rights, until other persons, (believing they had abandoned them,) are induced to buy and improve the lands, they come with a bad grace to claim the State's protection. See 3 Yerger, 405-7; Meigs' Rep., 224; 8 Humph., 406; acts of 1819, N. & C., p. 442-4; 11 Humph., 317; 1 Swan, 321 and 382.

S. WILLIAMS, for defendant in error.

CAROTHERS, J., delivered the opinion of the court.

This is an action of ejectment for six hundred and forty acres of land in Dyer county. The plaintiff below read and relied upon a grant by the State of Tennessee, dated 2d July, 1824, to the trustees of Cumberland College, assignees of the University of North Carolina, and proved the defendants in possession.

The defendant relied upon the deeds of the sheriff of Dyer county, on tax sales, and more than seven years possession under them by himself or tenants. The court

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charged that the deeds were void, and that the statute of limitation did not run against the plaintiffs below.

The only question it is necessary for us to decide, arises upon the construction of the act of limitations of 1819. If that applies, it would not be material whether the tax sales and deeds were void or not; because, if the deeds "purported to convey an estate in fee simple," seven years' possession under them would cure them of all unsoundness, and make them perfect and paramount to all other titles, not within some of the savings of the statute.

But it is insisted here, that Cumberland College is saved from the operation of the statute. The words at the close of the third section Car. & Nich., 444, which are relied upon, are these: "*And provided also*, that this act shall have no bearing on the lands reserved for the use of schools."

Now, if by any fair construction, this saving can be extended to all lands held by universities, colleges, academies and common schools, we think public policy would require it to be done. As the promotion of learning in our country is of the highest importance to its prosperity and happiness, the protection of lands and other means set apart for that purpose, might, perhaps, very properly, deserve more consideration than the policy upon which statutes of limitation are founded. By these laws the better title is made to yield to the inferior; because, as a general question of interest to the whole, it is thought best to offer up, as a sacrifice to the general good, to the peace and quiet of society, the individual rights of the citizen, or at least to withhold from him the aid of the courts, in asserting his rights after a fixed period. This, then, being a mere question of public policy, and

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against private right, it might seem that the higher policy of sustaining schools ought to prevail. This, however, is not for us, but the legislature to determine.

But the question before us is one of construction of legislative intention. Was it the intention of the legislature of 1819, to exempt from the general operation of the act, cases of this description; or can their language, by any fair construction, be extended so far? If so, we would certainly be inclined to adopt it.

It is, however, well settled by a long series of decisions in this State, that the savings of the statute cannot be increased or enlarged by the courts. New exceptions must be made by the legislature, as that body may deem it wise and proper.

The titles of corporations, whether they are created for schools or other purposes, are certainly subject to the general bar of the statute. There is no saving for them. The saving is only in the case of lands "*reserved* for the use of schools." Can it be supposed that it was in the mind of the legislature, in 1819, to embrace in that saving, lands that might be after that time sold, or donated by individuals or other corporations, to institutions of learning? The word *reserved*, must have some meaning. The legislative history of the country, up to that time, clearly fixes the signification of the phrase.

By the Cession Act of congress of 1806, 2 Hay. & Cobb, 14, as a condition of the cession, to the State of Tennessee, of all the vacant land north and east of a line therein designated, afterwards called the "congressional reservation line," required the State to appropriate one hundred thousand acres in one tract to colleges, the same quantity for the use of academies, one in each county, and moreover six hundred and forty

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acres in every six miles square, where existing claims will allow it, "which shall be appropriated for the use of *schools* for the instruction of children forever." The college and academy lands, the legislature was empowered to sell for not less than two dollars per acre, and vest the proceeds for the purposes intended. No such power was expressly given over the "school lands." Now, these lands in the various counties where they were located, were always known by the name of school lands, or lands reserved for the use of schools. They were much neglected by the public authorities and subject to be wasted and occupied by intruders. There was then a definite idea in the phrase "reserved for the use of schools." But to give it the largest signification of which it is capable, it could only be extended to the college and academy, as well as school lands, reserved in this act of cession, or set apart and "reserved" from sale or appropriation for other purposes, by the legislature acting under, and in pursuance of the act of congress.

The warrant upon which the grant in this case is based, was transferred, with many others, to the trustees of Cumberland College, by the University of North Carolina, in 1822. To extend the saving in the statute to these lands, would leave no land belonging to a literary institution, whether obtained by will, deed or otherwise, subject to the bar. This construction would not only give the word "schools" a much larger signification than that which it has in common parlance, or most probably had in the minds of the members of the legislature of 1819, but would strike out the word "reserved," or entirely change its meaning.

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We feel constrained, then, in giving a fair construction to the language of the act, and sustaining the policy on which it is founded, to decide that the plaintiff below is not embraced in the saving of the statute, and is therefore subject to the bar of seven years.

His honor, the circuit judge, having charged the law differently, the judgment must be reversed, and a new trial awarded.

TOTTEN, J., dissented.

JONES vs. JONES.

ACTION. Employer and employee. How and to what extent the person employed shall recover compensation or damages if discharged by his employer. A person hired to perform a particular service, during a stated period and for a specified price, if he be discharged from service by the hirer, may, upon his contract, recover the full price stipulated to be paid him if it does not appear that he was discharged for sufficient cause, or that within the period for which he was hired he was not admitted into the service of another person. In the event the person hired has been admitted into the service of another, the measure of damages to be recovered by him in an action against his employer upon the contract, will be the amount stipulated in the first instance, less the amount agreed to be paid by the second employer, or, in the absence of an agreement, the value of the services. In the event the person hired be discharged for sufficient cause, he may, notwithstanding, recover upon a quantum meruit the value of the services rendered his employer.

This was an action of assumpsit in the circuit court of Hardeman county. At the October Term, 1852, HUMPHREYS, Judge, presiding, there was judgment for the plaintiff and the defendant appealed in error.

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J. L. T. SNEED, for plaintiff in error, cited *Eakin vs. Harrison*, 4 McCord, 249; *Byrd vs. Boyd*, *Ib.*, 248.

MILLER, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

Assumpsit for work and labor; judgment for the plaintiff, and appeal in error, by defendant, to this court.

The case is this: There was a contract between the parties, by which William T. Jones, the plaintiff below, agreed with M. Jones, the defendant below, to oversee and manage defendant's plantation and his servants, interests and affairs connected therewith, for the year 1851. His wages as such overseer and manager, were to be two hundred and seventy-five dollars. His services commenced January 22, and about May 8, 1851, he was discharged by defendant, left the premises and did no further service for him. There is evidence tending to show that the plaintiff was guilty of abuse and cruelty towards the servants, and of neglect and mismanagement of the farm and stock, while the same were under his charge. A witness testified as to the general character of the plaintiff as an overseer, and said he was proverbial for his cruelty and inhumanity to negroes, and was of opinion that defendant knew his character in this respect before the employment.

Another witness stated that plaintiff was uncontrollable, was very cruel to slaves, but was industrious and attended closely to business. This character for cruelty is sufficiently illustrated by facts stated by other witnesses.

Defendant stated to a witness before the contract, that he "had gone somewhat in debt, that he knew

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the plaintiff; wanted him to make a crop; wanted a go-ahead-fellow." After the plaintiff was discharged, he was employed by Mr. Nevil, about June, and continued in his service as an overseer and manager for the balance of the year, 1851. The verdict was for two hundred and seventy-five dollars, the price stipulated for the entire year.

The argument here made resolves itself into two questions:

First: Is the defendant liable on his contract?

Second: If liable, then, to what extent?

The plaintiff does not pretend that he has performed his part of the contract, but alleges as an excuse, that defendant refused to receive performance and discharged him from his service. This is a good excuse and is taken as equivalent to performance if the defendant was in fault, and had no right, in view of the facts in the case, to discharge the plaintiff from his service. If the defendant had no right to rescind the contract, it is not in point of fact, rescinded, but remains obligatory upon him, though he refused, on his part, to perform it or to accept performance. In this view of the case the defendant is liable to the full extent of the wages stipulated in his contract. On the contrary, it is equally clear, that if the plaintiff voluntarily abandoned the defendant's service, without sufficient cause, and against his will, he will not be entitled to recover; not even for the labor he had actually performed; *Jennings vs. Camp*, 13 Johns. R., 95; *McMillan vs. Vanderlip*, 12 Johns. R., 166; *Read vs. Moore*, 19 J. R., 340; *Hoar vs. Clute*, 15 J. R., 225; 2 East, 143; 2 Mass. R., 127.

In the next place, there can be no question but that it was competent for the defendant to rescind the con-

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tract and discharge the plaintiff from his service, for sufficient cause; *Spain vs. Arnott*, 3 Eng. Com. Law R., 339. And considering the important nature of the service, and the confidence and trust that must be reposed in the overseer, it must be held sufficient cause for his discharge, if he be guilty of cruelty to the slaves, under his care and protection, or of bad and indiscret management in their government and control, or if he be unskilful and improvident in the management of the farm and interests placed under his charge. These several grounds are insisted upon in the present case, but it is clear, that they resolve themselves into questions of fact, to be determined by a jury, under proper instructions.

If the plaintiff was discharged for sufficient cause, he is not entitled to recover for the balance of the year, there being no subsisting contract after such rescission, and no services actually performed.

The question then remains in this connexion, whether the overseer, discharged for sufficient cause, is entitled to recover for the services rendered before his discharge? It is clear that he cannot recover upon his contract, because he has not performed it; but, on the contrary, has violated it by such acts and omissions, as rendered it legal and proper for the defendant to discharge him; and according to the English cases, he has very probably forfeited all claim to compensation for the services actually rendered. He must be able to aver performance, or some fault on the part of the defendant, which shall have the effect to excuse the necessity of performance. In the case supposed, he can do neither the one nor the other. But, upon principle, we think he is entitled to recover upon the common counts, a *quantum meruit*, for any services performed before he was discharged.

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This liberal rule has been adopted in South Carolina, and we think it just and reasonable; *Byrd vs. Boyd*, 1827, in 4 McCord's Reports. It is obvious that the amount of his recovery, in this respect, will depend upon the merit of his claim, as it may appear to the jury. If he merit nothing, he will recover nothing; but, if his services have been useful to defendant, while in his employment, he will be entitled to recover *pro rata*, according to their value.

There is still another point of view in which this case has been presented. Upon the hypothesis that the plaintiff was discharged without sufficient cause, and afterwards went into the service of another person, as overseer, for the balance of the year, what shall be the measure of damages upon his recovery?

In such case, the rule is, that the plaintiff is not entitled to full pay for the entire year, but his recovery will be reduced by the amount he received, or is entitled to receive, in his second employment; *Shannon vs. Comstock*, 21 Wend. R., 459; *Miller vs. Mariner's Church*, 3 Greenl., 55; *Costigan vs. Rail Road Company*, 2 Denio R., 609.

In *Miller vs. Mariner's Church*, the justice and equity of the rule are strongly illustrated: "A mason is engaged to work for a month, and tenders himself, and offers to perform; but his hirer declines the service. The next day the mason is employed at equal wages elsewhere for a month. Clearly, his loss is but one day; and it is his duty to seek other employment. Idleness is, itself, a breach of moral obligation. But, if he continue idle for the purpose of charging another, he superadds a fraud, which the law had rather punish than countenance." It is clear, that if similar service in this

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same region, be tendered to the plaintiff, and refused, the same rule will apply.

Now, in the present case, after stating the rule on this subject, to the jury, his honor, the circuit judge, proceeded to say: "That to make this an available defense, it was not sufficient to show the employment obtained or offered as stated, without also showing the *amount paid*, or offered to be paid, for such employment." It is true, that this is matter in defense, and the burden of proof rests upon the defendant. If the defendant show the "amount paid," that will be sufficient; and so, if he show the amount *agreed* to be paid, or, in the absence of an express contract, the amount to which the plaintiff is entitled upon a *quantum meruit*, that will also be sufficient, and will entitle the defendant to a reduction *pro tanto*, of the damages. The charge, in this respect, is too much restricted, and in view of the facts in the case, we cannot but think that it misled the jury. The plaintiff's second employment, as overseer, continued for some eight months. The facts and circumstances in the case tend to show its reasonable value. Yet, the jury seem not to have regarded it as of any value, inasmuch as they have given the plaintiff full pay for the entire year. The verdict is evidently founded upon the ground, that the plaintiff was improperly dismissed, and is for the full amount stipulated in the contract. But, as the term, continuance, and circumstances of the second employment, were clearly proved, we can see no reason why it was not taken into consideration, and the damages reduced by its reasonable value, in the absence of express proof of the "amount paid," unless the jury considered themselves restricted by the terms of the charge.

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In this view of the case, we think it proper to set aside the verdict, and remand the cause for another trial. Judgment reversed.

POPE vs. THE STATE.

RETAILING LIQUORS. License. A license issued under the Act of 1846, ch. 90, is *void*, according to the positive declarations of § 3, unless the oath required to be administered to the retailer, is *endorsed thereon*. The statute is not complied with and the license made valid, by the fact that the oath was administered and recorded in the office of the clerk.

Pope was indicted in the circuit court of Carroll county, for retailing liquors without license. At the August Term, 1852, FITZGERALD, Judge, presiding, he was convicted, and judgment pronounced against him; whereupon, he appealed in error.

ATTORNEY GENERAL, for the State.

CARUTHERS, J., delivered the opinion of the court.

The defendant was indicted for retailing spirituous liquors contrary to law. The facts charged were fully proved. He produced in defence, a license from the clerk of the county court, regularly issued, except that the oath required by the Act of 1846, ch. 90, § 3, is not endorsed on the back. He proved by the clerk that he complied with all the provisions of the act;

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and that the oath was duly administered to him and recorded, and preserved in his office, as the law directs. A transcript of the oath, as administered and recorded, was produced in evidence, and it conforms strictly to the act. But the court charged the jury that the defendant was not protected; that his license was void. He was found guilty. The only question here is, whether the law was correctly charged; and we think it was, and that the judgment must be affirmed.

It is argued that the defendant was in no fault; that he paid his money, entered into the bond, and took the oath required by law; that nothing more was to be done by him; and that the omission of the clerk to do his duty ought not to effect the validity of the license, and expose the defendant to the penalties prescribed for offenders against this law. The argument is plausible, but legally unsound. The 4th section provides "that the oath shall be recorded and preserved by the clerk, *and also endorsed on the back of the license*; and every license issued without said oath being taken, *and endorsed thereon, shall be void.*" We are not left, then, to reason about the propriety of the requisition, who was in fault, or the hardness of the case. The provision is unambiguous, positive, and cannot be disregarded. It was the business of the defendant, before entering upon this privileged vocation, to see that his authority was such as the law required. He was bound to know the law under which he was about to act; and by that, his commission is expressly declared to be void. It will not be presumed by the court, that the legislature looked with so much favor upon this traffic, as to intend that any of the express conditions of the enjoyment of the peculiar privilege of retailing liquor to the people, wasting their

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substance and corrupting their morals, should be relaxed by the courts. It would be unbecoming in us to arraign the legislature, or question their wisdom in this, or any other constitutional measure which they have solemnly adopted. But it is our province to give force and effect to their acts, as we find them, in all their parts.

We only conform, then, to the express language of the act of the legislature, in declaring that the license of the defendant is void, and affords him no legal defense to this prosecution.

THE GOVERNOR vs. MONTGOMERY et al.

REVENUE. Tax list. Liability of sheriff or revenue collector. While it is true that a sheriff or revenue collector, or the sureties of either, cannot be made liable upon their bond, because of a failure to collect taxes when no tax list has been furnished to the sheriff or collector, authenticated in the manner directed by statute; still, it is also true, that the officer and his sureties are liable for so much of the revenue as *has been collected*, whether the tax list be properly authenticated or not.

This was an action of debt, as stated in the opinion, brought in the circuit court of Perry county. At the May Term, 1851, WALKER, Judge, presiding, there was judgment for the defendant, and Attorney General HILL, in behalf of the plaintiff, appealed in error.

ATTORNEY GENERAL, for plaintiff in error.

BULLOCK & SCURLOCK, for defendants in error, cited 5 Ire. Rep., 129; *Ib.*, 227.

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McKINNEY, J., delivered the opinion of the court.

This is an action of debt, brought upon the official bond of William Welch, as sheriff and collector of the public taxes of Perry county, for the years, 1838, and 1839. The defendants are a portion of the sureties in said bond; Welch, the principal, and the other sureties, not being sued in this action.

The declaration alleges, that said Welch, as sheriff and collector aforesaid, collected for the year 1838, the sum of three hundred and forty-four dollars; and for the year 1839, the sum of three hundred and fifty-five dollars and ninety-five cents, being the amounts due to the State, for taxes, from said county, for said years.

The first breach of the condition of the bond assigned, is, the failure and refusal of said Welch to pay over, or account for, said sums of money, as by law, he was required to do. A second breach assigned, is, the failure and neglect of said Welch to collect the foregoing amounts of taxes due to the State, from said county.

The defendants pleaded several pleas, one of which only need be noticed. This plea, in substance, avers that the clerk of the county court of said county, failed to make out and deliver to said Welch, as sheriff and collector aforesaid, a tax list in the manner prescribed by law. Upon this plea, which expressly negatives an allegation of the declaration, issue was joined.

It appears from the proof, as set forth in the bill of exceptions, that Welch left this State about the year 1842. It further appears, that, on the trial, two books were produced and offered in evidence, on behalf of the plaintiff, which purported to be the tax lists, by authority of which, said Welch had collected the public

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taxes of said county, for the years 1838, and 1839. Said books were in the handwriting of the clerk of the county court of said county, or of a person employed in his office. They contained lists of the names, taxable property, value, and amounts of taxes, as required by law; but they were not authenticated as "true transcripts from the record book" of the clerk, by certificate of the clerk thereon, or otherwise. It was further proved, that Welch had these books in his possession, during the years 1838, and 1839, and that he collected taxes, during those years, from said books; that his habit was, when he received taxes, to make a cross-mark opposite the name of the party paying, and that most of the names had such mark opposite to them. Three of the witnesses examined on the trial, proved that they had severally paid their taxes to said Welch for each of said years.

His honor, the circuit judge, was of opinion, and so instructed the jury, that the books, or supposed tax-lists above mentioned, not being authenticated or certified by the clerk of the county court, as required by law, were nullities, and conferred no authority upon Welch, to collect the public taxes; and that the defendants, as his sureties, were not liable upon their bond, for taxes received by him, without any valid authority. This is the substance of so much of the charge as is necessary to be noticed.

The jury found for the defendants, and a new trial having been refused, the case is brought to this court by an appeal in error.

In considering this case, it must be kept in view, that the declaration has a two-fold aspect, and seeks to hold the defendants liable upon two distinct and oppo-

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site grounds: First, for the amount of taxes alleged to have been actually collected by Welch, under and by virtue of the supposed tax list in his hands: And, secondly, for his failure and neglect to collect the taxes. And the question for our determination is, whether the matter relied upon in the plea, the failure of the clerk to furnish the collector with a properly authenticated tax list, is sufficient to exonerate either the collector, or the defendants as his sureties, from liability on either of the grounds assumed in the declaration.

By the act of 1835, ch. 15, § 14, (as modified by the act of 1838, ch. 165, § 3,) it is made the duty of the clerk of the county court, within *forty* days after the court to which the revenue commissioners are required to make their returns of taxable property and polls, to record such returns in a well bound book; and also to make out on said record book the amount of each person's taxes; and furthermore, he is required to deliver to the sheriff or collector, within said period of forty days, a true transcript from said record book.

The statute provides that when the sheriff or collector shall have received the list of polls and taxable property in his county, he shall appoint a day and place in each justice's district, when and where he will attend to receive taxes, of which he is required to give at least twenty days' notice, by previous advertisement, at four of the most public places in said district; and if any person shall fail to attend, or to pay his taxes, on or before the appointed day, it is made the duty of the collector to levy the same by *distress* and sale of the goods and chattels of the person in default.

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By the act of 1833, ch. 86, § 1, the failure or refusal of the clerk of the county court to furnish a tax list to the collector, in the time and manner pointed out by law, is declared to constitute a misdemeanor in office, for which he may be indicted in the circuit court of the county of which he is clerk; and upon conviction, may be removed from office. And by the second section of the same act, it is provided that, upon satisfactory proof of the fact being made to the treasurer and county trustee, of the failure or refusal of the clerk to furnish the tax list to the sheriff or collector, as directed by law, they are required to suspend taking judgment against such sheriff or collector, "until a reasonable time after the reception of said list shall enable him to collect said tax."

The foregoing statutory provisions establish the proposition laid down in the instructions of the circuit judge, and repeated in argument here, that a transcript from the record book of the clerk, or tax list, as it is usually called, made out as required by law, and duly authenticated by the clerk, is the only authority by virtue of which the sheriff or collector is entitled to demand or receive the public taxes. Such tax list, in the hands of the collector, has the force and effect of an execution, and in virtue thereof, he may distrain the personal goods of the party failing to pay his taxes. But, without such tax list in his hands, every tax-payer may refuse to pay, and the collector has neither the right to demand nor the power to coerce payment. It would seem to follow, therefore, that in a proceeding against the sheriff or collector, or against his sureties, by suit or otherwise, founded merely upon the neglect or omission of the sheriff or collector to collect the taxes, the defense that

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the clerk had failed or refused to furnish him with a tax list, properly authenticated as required by law, would form a bar; because, until such reasonable time after the reception of the tax list as would be sufficient to enable him to collect the taxes, the sheriff or collector would be guilty of no negligence or default.

But the rule is very different, where the sheriff, or collector has actually received public revenue, either under an invalid authority, or without any color of authority. In such case, neither he nor his sureties can be heard to resist a recovery of the money thus received, on the ground of want of proper authority to receive the same. In the case of the *Governor vs. Scanland*, 6 Humph., 195, it was held, that, notwithstanding the election of Scanland to the office of sheriff, was utterly void, by the express provision of the act of 1844, ch. 196, § 2, and his induction into the office wholly illegal, yet, that having, under color of his office of sheriff *de facto*, received a portion of the public taxes which he had failed to pay over, neither he, nor his sureties who had voluntarily bound themselves for the faithful performance of his duties, could absolve themselves from their obligation, by insisting that his appointment was void, and consequently, that he had no authority to receive the taxes. That was a much stronger case than the present. There, the person had wrongfully intruded himself into office, and had not the color of lawful authority to receive the taxes. In the present case, the appointment of the sheriff was in all respects regular, and in all respects free from exception. He had in his hands, in fact, a tax list made out and furnished to him by the clerk, subject to no exception, save the want of proper authentication; and although invalid for that reason, he

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chose to regard it as valid; and by authority thereof, proceeded to collect and receive the taxes. Upon this state of facts, it is very clear, that the invalidity of the tax list, constitutes no defense to the action, so far as it respects the amount of taxes actually received by the sheriff. The matter of the plea of the defendants, is altogether irrelevant, and the issue joined thereon, wholly immaterial.

In this view it results, that as far forth as it shall be made to appear, from the books referred to in the proof, or other competent evidence, that the taxes were in fact received by the sheriff, the defendants will be liable therefor.

The judgment will therefore be reversed, and the case be remanded to the circuit court for a new trial. And upon the return of the case to that court, it will perhaps be advisable to add a new count to the declaration, adapted to the view of the case herein presented.

WILLIAMS vs. JONES et als.

CONSTRUCTION OF WRITINGS. *Will.* The testator's will contained the following provisions: "I loan to my beloved wife, Martha Williams, the following property, to wit:" (sundry slaves) "during her natural life." And all his other property after paying his debts. "The condition of the above loan is such, that if the said Martha Williams should think proper to marry, or dispose of this property in any manner whatever, so that Thomas Jones, Margaret Jones, Rebecca Andrews, Elizabeth Jones, nor either of them nor their heirs shall never enjoy any of the above named property, nor money, nor have anything to do with it, in any manner whatever, then the above loan to be void or else stand in full force and virtue. It is my desire that no misconstruction be laid on this my last will and testament so as to deprive my wife, Martha Williams, of a bona fide title to the above named property and the increase thereof forever; provided that she should manage it in such manner that neither of the above mentioned" persons, "nor neither of their heirs shall never inherit any part of my estate. But if she should not dispose of this property so as to deprive" said persons "nor their heirs, then this loan to take effect." *Held* that under this will the widow took an absolute estate which she might dispose of by will or deed to the excluded persons or others at her pleasure.

This was a bill filed in the chancery court at Trenton, upon the fact and for the purpose stated in the opinion. At the January Term, 1853, there was a decree for the respondents and the complainant appealed.

McCLANAHAN and SAMPSON & SON, for complainant, argued that the widow took not a conditional legacy but had an estate for life beyond any condition or forfeiture and a power of appointment as to who should take the fee; in the mode of the exercise of this power she was limited, however, and that the limitations and restrictions imposed upon the exercise of the power should have been observed by the widow. Not being so, the disposition which she made of the property to the respondents was void; 2 Crabb, 442, 468, 568; *Lane vs. Page*, Amb., 233.

S. WILLIAMS, M. & H. BROWN and W. R. HARRIS, for respondents, argued that the condition or provision in

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the will limiting the power of the *donee* without directing to whom the property should go, *is void, and the absolute estate was vested in the donee.*

CARUTHERS, J., delivered the opinion of the court.

The complainant, as the brother, and only heir and distributee of Charles Williams, who died in Virginia, in 1819, claims title to a number of slaves now in the possession of, and claimed by, the defendants. The said Charles Williams, by his will, left to his widow all his property for life, with certain conditions; and did not dispose of the remainder, as to which he died intestate, as is contended by complainant. The defendants, who hold said property by purchase from, and under the will of the widow, insist that her right was absolute under the will of her husband, and that their title from her is perfect.

The rights of the parties depend entirely upon the extent of the widow's interest under the will. The difficulty in the case, arises from the peculiar and unusual provisions of the will. It is in these words:

"I loan to my beloved wife, Martha Williams, the following property, to wit:" (sundry slaves,) "during her natural life," and all his other property, after paying debts. "The condition of the above loan is such, that if the said Martha Williams should think proper to marry, or dispose of this property in any manner whatever, so that Thomas Jones, Margaret Jones, Rebecca Andrews, Elizabeth Jones, nor neither of them, nor their heirs, shall never enjoy any of the above named property, nor money, nor have any thing to do with it, in any manner, whatever, then the above loan to be

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void, or else stand in full force and virtue. It is my desire that no misconstruction be laid on this my last will and testament, so as to deprive my wife, Martha Williams, of a bona fide title to the above named property and the increase thereof forever; provided, that she should manage it in such a manner that neither of the above mentioned persons, nor "neither of their heirs, shall never inherit any part of my estate. But if she should not dispose of this property so as to deprive" said persons, "nor their heirs, this loan to take effect." He then appoints his wife executrix, and provides that there shall be no security required of her, nor any appraisement of the estate.

The widow before her death, sold some of the slaves to the prohibited persons, and by her will bequeathed the balance of them, and all the acquisitions, to the same persons or their children.

Now, the main question for decision is, whether the widow took a life estate only, or an absolute estate. If the former, the remainder being undisposed of, goes to the complainant as the only heir and distributee of the testator; but if the latter, the defendants who hold under her, have a perfect title, and must prevail in this suit.

The principles of law which govern the case are plain, and the only difficulty results from the confused and complicated provisions of the testament. Perhaps we would hazard but little in saying that one just like it has never been seen before.

The most general rule in the construction of wills, is, that the intention of the testator must prevail, 10 Yerg. 20-29. To this leading rule, all others are not only subordinate, but auxiliary, except such as are founded on public policy, and the necessity of sustaining estab-

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lished principles of law; 3 Humphrey's Rep., 536-631; 4 Humph., 210.

This intention is to be ascertained, first, from the particular words used; second, the context; and third, the general scope and purpose of the instrument.

According to these tests, it is very clear that two things were intended, by the testator in the will before us: First, that the widow should only have a life-estate, if she made any disposition of the property favorable to certain relations of hers, therein named, or died without marrying, or making a disposition that would exclude them from taking it under the statutes of distributions, as her next of kin; that is, if she died intestate, not having previously sold the property. Secondly, it is clear, that he intended these proscribed relations should, in no event, get it. But, thirdly, it is very manifest, that he intended to give his widow the right and power to make an absolute disposition of the property, either by marrying, deed, or will. This seems to have been his most anxious desire and intention. He urges that idea in several clauses and aspects. And, for fear he might be misunderstood, as to the extent of the estate she was intended to have, and the power over the property he had given her, he reiterates his meaning in this remarkable and explicit sentence: "It is my desire, that no misconstruction be laid on this, my last will and testatment, so as to *deprive* my wife of a *bona fide title* to the above named property, and the increase thereof, *forever*." But to this, he annexes a proviso, that it must be so "managed" that the proscribed persons "shall never inherit any part of it." And if not so managed, then the "loan to take effect." That is, she shall have a full power to dispose of the

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fee simple by deed, gift, marriage or will, except to four persons, and in that event, her title shall be good and absolute; but if she fails to do this, or permits these four persons to have any benefit, or dies, leaving them to "inherit," as her next of kin, then her title is reduced to a life estate. Now, these conflicting intentions are all very palpable on the face of the will, and it must certainly be admitted, that his leading object was, to give his wife the most ample power over, and enjoyment of all his estate, (they being childless,) compatible with the cherished purpose of excluding her hated relations.

There is no rule of law better settled in this State, than that a gift by deed or will for life, with a power of disposal in fee, vests the whole estate in the first taker. Of this rule, Judge Turley remarks, in the case of *Davis vs. Richardson*, 10 Yer. 292, "that the question has been so elaborately investigated by this court in the case of *Smith T. vs. Bell and wife*, Mar. & Yer., 302, and in the case of *David et als. vs. Bridgeman et als.*, 2 Yer., 558; and so decided, further investigation would be useless."

In the case of *David vs. Bridgeman*, the only difficulty seemed to arise out of the fact that, by the will of Sampson David, on which the contest arose, the power of disposal given to his wife, Martha, was to be exercised "at her death." That, like this, was a controversy between the distributees of the testator and those of the widow, as no disposition was made in the will of the remainder; but it was claimed by testator's distributees that it remained undisposed of, as the widow made no will. The court decided this made no difference, and fully sustained that position by reason and authority.

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The principle is, that an unlimited power to dispose of the fee, whether exercised or not, determines the character of the estate by converting the life estate into a fee; it being incompatible with the idea of a limited estate. This power renders the remainder too doubtful and uncertain to be recognized or protected by the law. The express or implied reservation of it in such a case, is void, and it goes with the life estate.

The exclusion of particular persons from this absolute power, as in the case before us, does not affect the principle and prevent the application of the rule above laid down. It may have exceptions, but this is not one of them. Here the power is unlimited, both as to the quantity of estate and the mode of disposition, and the only restriction attempted to be imposed, is, the exclusion of certain designated individuals. This, we think, is inconsistent with the unlimited power of disposal, and cannot stand with it, being contradictory and in direct conflict. It follows, then, that the entire estate passed to Martha Williams, and that the title of defendants derived from her is perfect and unimpeachable, as against the complainant claiming as the representative and distributee of Charles Williams.

This view of the case renders it unnecessary to give any opinion on the other point presented in argument, involving the power of the county court to grant administration in any case twenty years after the death of a testator or intestate under the act of 1831, ch. 24, § 3, except in the case provided for in the act of 1835, ch. 86, § 3. We are not prepared to say that cases may not arise in which exceptions might be made to the provisions of that act, which would not be inconsistent with the intention of the legislature, nor will

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we say that this is not one of them. But upon this question we give no opinion, leaving it open for further discussion when a case shall arise which will render it necessary to decide it.

The decree of the chancellor dismissing the bill will be affirmed.

THE STATE vs. COPELAND.

CRIMINAL LAW. *Pleading.* Double pleading is not allowable in criminal cases. So if a party pleads a former conviction and also not guilty, the latter plea should be treated as a nullity.

This was an indictment in the circuit court of Perry county. At the May Term, 1850, MARTIN, Judge, presiding, judgment was rendered as stated in the opinion. and Attorney General HILL, in behalf of the State, appealed in error.

ATTORNEY GENERAL, for the State.

MAXWELL, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This is an indictment for an assault and battery, to which the defendant pleaded two pleas; first, a former conviction for the same offence, before a justice of the

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peace; and, secondly, a formal plea, *in writing*, of not guilty. The attorney general demurred, severally, to said pleas; and, on argument, the demurrer to the first plea was sustained, and the demurrer to the latter plea overruled; and thereupon the court ordered the defendant to be discharged.

It is very clear that double pleading is not allowable in criminal cases; and it was so held in *Hill vs. The State*, 2 Yerg., 248. The plea of not guilty ought, therefore, to have been treated as a nullity. On sustaining the demurrer to the plea of former conviction, which was proper, as the plea is defective, the defendant should have been held to answer the charge in the indictment. Why he was discharged, we are unable to perceive from anything in the record before us.

The judgment will be reversed, and the case be remanded for trial upon the merits.

THE STATE vs. BRADSHAW.

CRIMINAL LAW. *Giving spirituous liquors to slaves.* To convict one charged with giving spirituous liquors to a slave, in violation of the Act of 1852, ch. 174, § 10, it must be both averred and proved that the defendant was at the time, a grocer or retailer of spirituous liquors.

The defendant was presented by the grand jury of Gibson county, for giving spirituous liquors to a slave. At the July Term of the circuit court for that county.

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FITZGERALD, Judge, presiding, the presentment was quashed, and the Attorney General, in behalf of the State, appealed in error.

ATTORNEY GENERAL, for the State.

TOTTEN, J., delivered the opinion of the court.

This is a presentment for *giving* spirituous liquors to a slave, without the consent of the owner, or other person having the lawful control thereof, in writing; Act 1852, ch. 174, § 10.

The prohibition is limited to "any grocer or retailer" of spirituous or vinous liquors. It must, therefore, be *averred* and proved that the defendant was, at the time, such grocer or retailer; for the same act is not an offense in any other person. It is made an abuse of the licensed tippling privilege by a former statute to sell; by the present to give; spirituous or vinous liquors to a slave, without the consent, in writing, of the owner, &c.

Now, in the present case, it is not averred in the presentment, that defendant was such grocer or retailer. It is, therefore, bad, and was properly quashed by his honor, the circuit judge.

Let the judgment be affirmed.

BROWN *et als.* vs. PHELOX.

PRACTICE. *Non est factum.* Trial. Upon the trial of an issue upon a special plea of *non est factum*, which avers that the instrument signed by the defendant, was converted into a bill single by adding a seal to his signature, without his knowledge or consent, the proof of the issue is upon the defendant.

This was an action of debt in the common law and chancery court of the city of Memphis. At the November Term, 1852, HARRIS, Judge, presiding, there was judgment for the defendant, and the plaintiffs appealed in error.

W. K. POSTON, for plaintiffs in error, argued: The second plea of *non est factum*, filed by defendant, is a special plea, setting up special matter arising after the execution of the obligation, and in avoidance of it, and devolves the burden of proof upon the defendant, as the party averring it, and not upon the plaintiffs as charged by the court below. This is so both upon principle and authority. The party, holding the affirmative always assuming the *onus*. The plea avers the alteration; the replication denies it. See 2 Starkie on Ev., 273; Mod. Ca., 218; Com. Dig., title, Pleader, 2 W. 18; 5 Phillips on Ev., 147, n. 17; 1 Howard's United States Rep., 104, *United States vs. Linn et als.*; 1 Greenl. Ev., 474; 1 Starkie's Ev., 376.

Such was clearly the doctrine at common Law. It will be argued that our statutes, requiring the plea of *non est factum* to be filed *under oath*, has changed the common law doctrine, in that they regard pleas so filed, as establishing a *prima facie case* for the party pleading them. Not so. Our statutes have changed the method of pleading, not the effect of the plea. They very properly require that the solemnity attached by the law to sealed

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instruments, shall be so far maintained, as that the party executing them, shall not deny that execution, unless he do so under the solemnity of an oath. They have not constituted such pleas evidence for those filing them. At least, no such construction can be gathered from their phraseology. The only adjudication had in Tennessee since the passage of our statutes, in 1819, is the case of *Hill vs. Scales*, 7 Yerg. R., 410, decided in 1839, in which the defendant assumed the *onus*.

E. M. YERGER, for defendant in error.

McKINNEY, J., delivered the opinion of the court.

This is an action of debt, founded upon an instrument purporting to be a bill-single executed by the defendant to the plaintiffs. The defendant filed two pleas of *non est factum*, the first a general, and the second a special plea. The latter plea admits the signing and delivery of the instrument as a promissory note, but alleges that the same was afterwards altered, without his knowledge, consent, or authority, by affixing a *seal* to his signature; issues were joined on these pleas.

No evidence on the latter issue being adduced on either side, the question arose, on the trial, upon which party the burden of proof rested; and on this question the judge instructed the jury, that the proof of the issue was upon the plaintiffs; "that to maintain their action they must show, that the seal or scroll was attached to the bond at the time it was executed by the defendant; or has since been placed there by him. or by his authority; or has been recognized or adopted by him."

[Brown *et al.* vs. Phelon.]

The jury found for the defendant, and the plaintiffs have prosecuted an appeal in error to this court.

The instruction, we think, is erroneous. It is well settled, that where the plea is *non est factum* generally, the proof lies upon the plaintiff; but, on the other hand, where the plea alleges that the deed is void for some special matter, the proof is on the defendant. And this distinction rests upon the principle, that the obligation of proving the fact in issue lies upon the party who substantially asserts the affirmative. Here, the defendant in his plea affirmatively avers the alteration of the instrument, and therefore, he must prove it; 2 Starkie's Ev., 482, (3 Am. Ed.;) Com. Dig., Pleader, 2 W., 18.

This case does not fall within the rule, that where the alteration appears on the face of the instrument, as an erasure, interlineation, or the like, the law imposes upon the party who claims under the instrument the burden of explaining such alteration. There is nothing upon the face of this instrument, so far as appears from the record before us, indicating any alteration, or casting any suspicion upon it; and therefore, aside from the special averment of the plea, no explanation is necessary; 1 Greenl. on Ev., § 564; 1 Howard's U. S. Rep., 104.

The instruction of the court upon the plea of the statute of limitations need not be noticed, because if either plea of *non est factum* should be found for the defendant, the instrument being thereby avoided, the action must fail; and should the finding be against him on these pleas, the plea of the statute of limitations would constitute no ground of defense to the action; so that, in any aspect of the case, this plea is irrelevant and improper.

[*Dick & Co. vs. Powell.*]

The judgment of the circuit court will be reversed, and the case be remanded for a new trial.

DICK & CO. *vs.* POWELL.

BANKRUPT. *Petition for writ of supersedeas.* The petition of a bankrupt for the writ of supersedeas, to stay the collection of a debt, from the payment of which he has been discharged under the act of Congress of 19th August, 1841, need not aver that the debt was not incurred by the bankrupt in "a fiduciary capacity." In such petition the averments must be certain only to a "common intent."

SAME. *Judgment rendered against him after the filing of his petition in bankruptcy.* The certificate of discharge under the act of Congress of 19th August, 1841, applies to judgments obtained against the bankrupt after he filed his petition in bankruptcy, if the judgment be upon a debt which he owed at the time of filing his petition. The judgment is not a new debt, but a new security given by the act of the law, for the same debt.

This was a proceeding of the character stated in the opinion, in the circuit court of Haywood county. At the November Term, 1852, READ, Judge, presiding, judgment was rendered for the defendant, and the plaintiff appealed in error.

BULLOCK, READ & SHAPARD, and RAINS & FREEMAN, for plaintiff in error, argued: The defendant having failed to make any defense to the suit, after filing his petition in bankruptcy, by pleading the pendency of his application in bankruptcy, or obtaining an order on the plaintiffs to stay proceedings till the termination of the proceedings in bankruptcy, can not now be relieved from

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the judgment in this proceeding, by supersedeas. The petition, and the pending of the application to be discharged as a bankrupt, might well have been pleaded as a defense to the suit; and no defense which existed anterior to the judgment, can be now pleaded, or relied upon to defeat the judgment; 1 Chitty's Pl., 522; 8 Johns. Rep., 77. The judgment extinguished the debt due by the bill single, and created a new debt, and this new debt was not a debt due at the time of filing his petition; and we insist that he is not discharged from this judgment by the proceedings in bankruptcy, as this debt was created after the filing of his petition to be discharged as a bankrupt; *Thompson vs. Hewitt*, 6 Hill's R., 254; *Crouch vs. Gridley*, 6 Hill, 250; *Mechanic's Bank vs. Hazzard*, 9 Johns. R., 39; *Russ vs. Gilbert*, 2 Maule & Selwyn, 70; 3 *Ib.*, 327.

The district court on the application of the bankrupt, or the assignee, might and would have issued an injunction to stay proceedings before the discharge was granted until the further order of that court; and when the discharge was granted, he might have pleaded the discharge *puis d'arien* continuance, and having failed to do so, he comes now too late to be relieved from the judgment, by superseding the execution issued on the judgment rendered against him in consequence of his own laches.

The defendant, in his petition for *supersedeas*, does not, as he should have done, state that the debt from which he seeks to be relieved, was not created in consequence of defalcation as a *public officer*, or as *executor*, *administrator*, *guardian*, or *trustee*, or *while acting* in any other *fiduciary character*; *Maples vs. Burnside*. 1 Denio N. Y. R., 332.

[Dick & Co. vs. Powell.]

M. & H. BROWN and T. G. & W. M. SMITH, for defendant in error, argued: The certificate of discharge under the act of Congress of 1841, is a perfect and complete discharge from "all debts, contracts and other engagements," which were "proveable" under the commission. This debt fell within this class. The defendant could not have plead his bankruptcy at any time before final judgment against him, because he had not obtained his discharge; *Lummus vs. Fairfield*, 5 Mass. Rep., 248.

When a judgment is obtained against a petitioner in bankruptcy, *pending his petition*, and before his certificate, on a debt contracted before the petition was filed, the certificate of discharge, when granted, is a discharge from the judgment; *Johnson & Clark vs. Fitzhugh et als.*, 3 Barbour's Ch. (N. Y.) Rep., 360, 372-3. The same doctrine has been held in all the States where the question has been decided; see United States Dig.

The same rule prevails in England; see Petersd., title Bankrupt Certificate, letters e. b., 3 Vol., p. 897. Relief will be granted on motion; *Baker vs. The Judges of Ulster Common Pleas*, 4 Johns. Rep., 191; and see the cases above referred to.

TOTTEN J., delivered the opinion of the court.

Dick & Co. were holders of a note on James B. Powell and others, makers thereof, due August 28, 1839, for two thousand two hundred and eighty-one dollars.

They instituted suit thereon, against said makers, in the circuit court of Haywood, May 31, 1841, and judgment was thereon rendered, October 10, 1842, for two thousand seven hundred and seven dollars.

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On the 5th September, 1842, said James B. Powell filed his petition as a voluntary bankrupt in the district court, U. S., at Jackson, under the general bankrupt law of August 19, 1841, and thereon, by decree of said court, July 6, 1843, was discharged from all his debts "owing and contracted" at the time of the presentation of said petition, and obtained his certificate in pursuance thereof.

The plaintiffs caused an *alias* execution to issue, March 8, 1852, on their said judgment, it remaining unsatisfied, to be levied of the estate of said Powell, who thereon by petition in the circuit court of Haywood, applied for a *supersedeas*, which was granted. At the return thereof, October 9, 1852, the plaintiffs' motion to dismiss the petition in this behalf, was overruled, and the defendant's motion to *quash* the execution sustained, and the execution, as to this defendant, *quashed* by the judgment of said court. The plaintiffs appeal in error to this court.

Several questions are made by counsel for the plaintiffs in error.

First: That the court erred in refusing to dismiss the petition, because, it does not aver that the debt in question was not created by the debtor "while acting in a fiduciary capacity," and *Maples vs. Burnside*, 1 Denio R., 334, is relied on.

The certificate, fairly obtained, is a discharge from all debts owing by the bankrupt at the time of the prosecution of his petition, except those contracted or incurred in a "fiduciary capacity." As to them it does not apply and is no discharge. The general rule is that all the debts are discharged, but it has an exception of a special class of debts. Now, the argu-

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ment is, that the bankrupt must state, by way of negative averment, that the debt is not of the excepted class. The certainty insisted upon is that which applies to pleas in abatement; that is, "certainty to a certain intent in every particular." We are of opinion that in a case like this, if the averments be certain to a "common intent" that is sufficient. It will be presumed in the absence of any averment to the contrary, that the debt falls under the general provision of the law, and not under an exception to it. Besides, upon principle, the averment and proof must be made by him, who holds the affirmative; that is, the creditor must aver and prove that the debt is founded in a fiduciary obligation, and therefore, is not affected by the certificate. For, how can the debtor prove that it is not so founded, except by proving it to be something else, from which the negative inference could be drawn? Such proof would be irrelevant, except in defence, and to rebut the plaintiff's proof.

We do not concur in the doctrine of the New York case, and consider that the petition, omitting the negative averment in question, was sufficient.

2. That the judgment being rendered *after* the presentation of the petition in bankruptcy, though *before* the *final decree*, is a *new debt*, to which the certificate does not apply. And in this connection, it is further argued, that as defendant failed, after filing his petition in bankruptcy, to make defense to the action, he is now precluded by the judgment rendered therein. Cases are cited to support these positions; *Crouch vs. Gridley*, 6 Hill's R., 250; *Thompson vs. Hewitt*, 6 Hill's R., 254; *Kellogg vs. Schuyler*, 2 Denio R., 74.

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So far as these cases go to support the plaintiff's positions, we do not concur with them. We do not consider the judgment rendered on the note as a *new debt*. It is a new security given by the act of the law, for the same debt; and the old security, the note, is merged therein and extinguished. That is all. The debt secured by the note, was "*owing*" at the time the proceeding in bankruptcy was instituted; the judgment is founded upon that note, and not upon any *new* contract or consideration. The case of *Johnson vs. Fitzhugh*, 3 Barbour's Ch. R., 372, accords with this view of the subject, and is in conflict with the cases relied upon by the plaintiffs.

In the next place, it must be clear that the bankrupt is not precluded by the judgment, unless by plea he could have prevented its recovery. But the *institution* and *pendency* of his suit in bankruptcy was no matter in bar to the creditor's action for the debt, as the bankrupt might fail in his suit, and be defeated in his effort to obtain his certificate. Nothing short of the certificate could be good in bar, and that was not obtained until after the judgment was rendered; *Lummus vs. Fairfield*, 5 Mass. R., 250.

It is true, as we think, that the district court had jurisdiction to enjoin the plaintiffs, as creditors of the bankrupt, from proceeding further in their action upon the note; because, the suit in bankruptcy is a suit in equity, to which all the creditors of the bankrupt are to be considered as parties, and subject to such orders as it may be equitable to make in relation thereto; (*vid.* § 6.) Yet, the omission of the bankrupt to apply for the injunction, cannot affect the nature of the case; for, if it was a proper case for an injunction, it was the

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duty of the plaintiffs, after notice of the suit in bankruptcy, to suspend further action without the necessity of legal restraint; and their failure to do so, was, in some sense, a wrong, from which they cannot be allowed to take any benefit.

Now, as to the effect of the certificate, it shall "be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are proveable under the act;" subject, however, to be impeached for fraud, in the manner provided in the statute; § 4.

It is clear that the plaintiff's debt was proveable under the act, and entitled *pro rata*, to an interest in the assets of the bankrupt's estate. It is, therefore, fully and completely discharged, in virtue of the final decree and certificate in bankruptcy. And the circumstance that the plaintiffs proceeded to judgment in their action upon the note, does not at all affect, or change the nature of the case; 3 Petersd. Ab., 897; *Johnson vs. Fitzhugh*, 3 Barbour's Ch. R., 372.

The result is, that the plaintiffs were not entitled to any execution upon their judgment, and the same was properly quashed.

Let the judgment be affirmed.

CARTER vs. VAULX.

LOST INSTRUMENT. Affidavit of loss. Demurrer. In an action of debt upon a lost instrument under the act of 1819, ch. 27, the affidavit of the loss, appended to the declaration, is made a part of the record, and is to be taken as a substitute for profert of the instrument; hence, the sufficiency and validity of the declaration, including the affidavit, may be tested by demurrer.

SAME. Same. The affidavit, required by the statute to be made when the action is upon a lost instrument, must be verified before the court in which the action is brought; must also state that the note has not been sold or assigned, and must be made by the plaintiff, or his agent, or attorney, into whose hands the note has been committed, and by whom it has been lost, or mislaid.

This was an action of debt in the circuit court of Haywood county. At the June Term, 1852, READ, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

READ & SHAPARD, for plaintiff in error.

T. G. & W. M. SMITH, for defendant in error, argued: A demurrer was proper. By the act of 1819, ch. 27, C. & N., 417, it is provided that the affidavit shall be attached to the declaration; and in the case of *Powers vs. Fitzhugh*, 10 Humph., 415-417, it is said that "the affidavit forms part of the record of the cause." When an instrument is set out after oyer craved it becomes a part of the declaration, and is subject to demurrer; 1 Chit. Pl., 665-666; *Jones vs. Simmons*, 4 Humph., 314. The affidavit takes the place of an instrument set out after oyer, and thus becomes part of the record. If this were not so it could never be made part of the record, for it is not necessary to make profert of the affidavit, and oyer cannot be craved unless profert is made; Stephen's Pl., 69.

The case of *Kincaid vs. Francis*, Cooke's Rep., 49-53, decides that an affidavit accompanying a declara-

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tion, becomes part of the record, and that it is not necessary to crave oyer of it. If it was not necessary in this case to crave oyer of the affidavit, it was necessary that profert should have been made of it; and the declaration is demurrable on this ground, and the fault is reached by this demurrer; Stephen's Pl., 141.

The affidavits are not made in accordance with the statute, which, as it gives a new remedy, must be strictly followed; *Powers vs. Fitzhugh*, 10 Humph., 417; Peck, 172.

TOTTEN J., delivered the opinion of the court.

Debt on a lost note for eleven hundred dollars. A demurrer to the declaration was sustained, and plaintiff has appealed in error to this court.

The declaration is formal. Two affidavits of the loss of the note are annexed to the declaration; one by G. M. Fogg, stating that he had mailed said note at Nashville, to the address of E. J. Read, and it is verified before a justice at Nashville; the other is by said Read, to the effect that said note never came to his possession, and that he believes it has been lost or miscarried in the mail.

The Act of 1819, ch. 27, gives a remedy at law on lost instruments, but requires an affidavit of the loss, and that the instrument has not been sold or assigned to another. The affidavit is to be verified before the court where the suit is instituted, to be annexed to, and filed with the declaration. It "forms part of the record;" 10 Humph. R., 415; Cook's R., 49; it is to be taken as a substitute for *profert* and *oyer* of the instrument, and, in effect, becomes incorporated in, and forms part

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of the declaration. The demurrer is, therefore, a proper and convenient mode to test the sufficiency and validity of the declaration including the affidavit. It is true, that a more technical rule might require the substance of the affidavit to be stated in the declaration itself: as, that the instrument was lost, and that it had not been assigned. But such strictness has not been usual in practice; and we do not deem it material to require it, as the principal matter under the statute is the affidavit itself. Here, the declaration avers the loss of the instrument, but omits to aver that it had not been assigned.

2. The affidavits are bad. Mr. Fogg's is not verified before the court, as required by the statute, and is otherwise defective. Mr. Read's is defective in not stating that the note has not been sold or assigned. It is obvious, likewise, that Mr. Read can make no affidavit in the case, as the note never came to his hands, and he knows nothing of its existence or its loss. But we think it would be competent for an agent or attorney, into whose possession the instrument had actually come, and by him been lost or mislaid, to make the affidavit under the statute; because he represents the plaintiff, and is the only person to whom the facts are actually known. And so, a plea in abatement may be verified by an agent or attorney, if the facts stated in the plea be within his personal knowledge; *Bank of Tenn. vs. Jones*, 1 Swan's Rep., 391.

3. We may observe further, that the remedy at law, under the statute, does not supercede the former remedy in equity. That remains as it was before.

Judgment affirmed.

McCoy's *lessee vs.* WILLIFORD.

CHAMPERTY. *Adverse possession. Non-resident vendor.* A non-resident may lawfully sell and convey lands belonging to him in this State, though the land be held adversely at the time of the sale, if that possession be a mere naked possession without title. This is so by force of the terms of the second proviso to the first section of the champerty act of 1821.

SAME. *Same.* A contract by bond for the sale and conveyance of land, entered into *bona fide*, at a time when no adverse possession existed, may be executed by a deed of conveyance to the obligee in the bond, or to his assignee, after an adverse possession has commenced. And this rule prevails though the assignment of the bond was after the adverse possession had commenced.

This was an action of ejectment in the circuit court of Dyer county. At the October Term, 1852, READ, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

SAMPSON & SON and RAINS & FREEMAN, for plaintiff in error.

S. WILLIAMS, for defendant in error, cited 2 Humph., 409; 11 *Ib.*, 592; 1 Swan, 312.

McKINNEY, J., delivered the opinion of the court.

This was an action of ejectment in the circuit court of Dyer. The ground of defense relied upon, and on which the action failed, was *champerty*. The case as presented in the record, is this:

In the early part of the year, 1849, Henry W. Connor, (who from the recitals of some of the title papers in the record, purports to have been a resident of the city of Charleston, South Carolina,) through his attorney in fact, bargained, and covenanted to convey to Josiah Garrett, a tract of land of about one hundred and ten acres, situ-

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ate in Dyer county. A bond for title was executed, and delivered to him at the time of the contract. In July of the same year, a *verbal* contract was entered into between Garrett and the defendant, Williford, by which the former agreed to sell and convey to the latter, twenty-nine and a half acres of the above mentioned tract, purchased from Conner. A survey was made, and the boundary marked, of said twenty-nine and a half acres of land, and shortly afterwards Williford settled thereon, and has continued to reside there ever since. Afterwards, Garrett sold his interest in the entire tract of one hundred and ten acres to McCoy, the lessor of the plaintiff, and assigned to him Conner's bond for title; and thereupon, Conner, by his attorney, in fact, executed to McCoy a deed for said tract of land, pursuant to the terms of the title-bond. To recover the twenty-nine and a half acres this action was brought.

Upon this state of facts, the circuit judge instructed the jury, that, if, at the time of the sale and assignment of the title-bond by Garrett to McCoy, Williford was in possession of the land, claiming it as his own, the sale would be void, and the deed from Conner would likewise be void.

It seems to us, that the champerty act of 1821, has no application to this case. First, assuming the fact of Conner's non-residence to be established, the case is directly within the terms of the second proviso of the first section of the act, which declares, "that nothing herein contained shall be so construed as to prevent any non-resident of this state from selling and conveying any lands in this State, which said non-resident may own, of which lands no person may, at the time of such sale, hold adverse possession by deed, devise, or inheritance."

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At the time of the sale and execution of the title-bond by Conner to Garrett, there was no adverse possession of the land sold; and the subsequent possession of part thereof, by Williford, supposing it to have been adverse, being a mere *naked possession without title*, interposed no obstacle to the conveyance from Conner to McCoy. This is necessarily so by force of the terms of the proviso. But, secondly, without reference to the proviso, or to the fact that Connor is a non-resident, it is clear, in another view of the case, that champerty cannot be predicated of the conveyance from Conner to McCoy. It is settled, that a contract for the sale and conveyance of land, entered into *bona fide*, at a time when no adverse possession existed, may be consummated by the execution of a deed of conveyance after an adverse possession has commenced; 7 Yerg., 384, 398. The contract by which the purchaser became vested with an equitable title, being lawful and valid in its creation, its completion is not within the meaning of the prohibition of the champerty act, notwithstanding an intermediate adverse possession.

But it is argued, that as McCoy's interest was in fact acquired by his purchase from Garrett of the equitable title, after the adverse possession of Williford commenced, that the contract *between them* is within both the letter and spirit of the champerty act; and that the contract and transfer of the equitable title being void, it results, as a legal consequence, that the conveyance of the legal title by Conner to McCoy, is wholly inoperative; that, in legal effect, the transaction is the same as if Conner had conveyed to Garrett, and he to McCoy. To this reasoning, however plausible, we cannot yield our assent. It does not seem to us that sound policy requires the champerty act to be extended upon doubtful con-

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struction. It has always been held in this State that a title-bond may be transferred. The assignee is placed in the stead, and substituted to all the rights of the assignor; and, consequently, has the same right to demand the legal title from the vendor, in fulfilment of the terms of his bond. This being so, we hold that, as a conveyance from Conner to Garrett would have been free from all exception on the score of champerty, the conveyance in question from him to McCoy, is equally unexceptionable upon this ground. And we are not prepared to say that, upon a proper construction of the statute, it is competent to look beyond the legal title; at all events, we feel clear that it is not competent to do so in a court of law, on the trial of an action of ejectment.

The judgment will be reversed.

McGINNIS vs. ALLEN'S *adm'rs.*

SET OFF. *Action by personal representative.* To an action brought by a personal representative the defendant may, by way of set-off, avail himself of notes executed by the intestate; though assigned to the defendant by the payee after the death of the intestate; if the notes were such as would be proper matters of a set-off to an action brought by the intestate were he living.

This was an action of debt in the circuit court of Dyer county. At the June Term, 1852, READ, Judge, presiding, there was judgment for the plaintiffs and the defendant appealed in error.

[*McGinnis vs. Allen's adm'rs.*]

F. G. SAMPSON, for plaintiff in error, cited 1 Swan. 92; *Ib.* 258.

S. WILLIAMS, for defendant in error, cited 2 Hill 210; 3 U. S. Dig., 418; 6 New Hamp., 35; 20 Johns. R., 137; 36 Eng. Com. Law R., 443.

MCKINNEY, J., delivered the opinion of the court.

This was an action of debt brought in the circuit court of Dyer by the defendants in error against the plaintiff in error. Verdict and judgment against the defendant for five hundred and eighty-three dollars and eighty-three cents, and an appeal in error to this court. Among other grounds of defense to the action relied upon by the defendant, was a plea of set off. In support of this plea, the defendant, on the trial of the cause, offered two notes under seal, each for the sum of one hundred and seven dollars, executed by the plaintiffs' intestate to McClure & Co., and assigned to the defendant McGinnis, before the commencement of this suit, but after the death of the intestate. The court held that the defendant could not avail himself of these notes by way of set off to the plaintiffs' demand, on the ground that the assignment was *subsequent to the death of the intestate*.

In this we think there is error. If in an action by Allen, in his life-time, the notes would have been proper matters of set off, they are equally so in an action by his personal representatives. We are aware of no principle upon which the distinction taken by the circuit judge can be maintained. The *time* of the assignment, whether prior or subsequent to the intestate's death, is

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immaterial, provided it were before the institution of the suit. It is well settled by the course of decision under the act of 1756, ch. 4, § 7, that if the defendant, in an action in which a plea of set off is an admissible defense, were, at the time of the commencement of such action, the holder and proper owner of a note or bill-single executed by the plaintiff, either by endorsement or delivery, he may avail himself of such note or bill-single as a set-off to the plaintiff's demand; 8 Humph., 46; 1 Swan, 258; *Ib.* 92. Such debts are regarded as "mutual" within the meaning of the act. The set-off is given as a more summary and convenient remedy than a cross-action. The policy of the statute is to suppress useless litigation, and its provisions are therefore entitled to receive a favorable and liberal construction.

The argument against the admissibility of the set-off relied upon in this case, deduced from the policy of the statutes regulating the administration of *insolvent* estates, however well founded as applicable to cases conducted under the provisions of those statutes, has no application to the present case. So far as appears from this record, no suggestion of the *insolvency* of the intestate's estate has been, or could be made. If the estate be in fact *insolvent*, it is the business of the administrators to resort to the proper proceedings under the statutes.

Judgment reversed.

WALLS' *adm'r* vs. WARD.

CONSTRUCTION OF WRITINGS. *Gift of slaves, by deed, to take effect at the death of the donor, he retaining "the property of the slaves" during his life.* Walls, in his lifetime, executed, acknowledged and committed to registration, the following instrument: "Know all men by these presents, that I, John Walls, of the county of Rutherford, State of Tennessee, in consideration of the natural love and affection I bear my children, Solomon, Ryland, Hiram and Malinda Walls, have transferred and conveyed to them the following slaves for life, namely: Green, Clem, Harry, Edmond and Nancy, and her increase. To have and to hold said slaves unto said children, their heirs and assigns, to take effect at the termination of my natural life; I retaining the property of said slaves during my life. Witness my hand and seal, this first day of April, 1840. John Walls seal." Ward bought the interest of some of the children, and by a division of the slaves, after the death of Walls, one of them became his. The administrator of Walls brought suit in equity, to recover the negro set apart to Ward. *Held* that the instrument above quoted, is not a testamentary paper, but a deed, by which the right to the property was given to, and vested in his children, at the time of the execution of the deed, but not to take effect in possession, or be beneficially enjoyed, until his death, and that in a contest between the administrator of the donor, (no creditor of the donor, or subsequent purchaser being a party,) and a purchaser from the donee, effect would be given to the instrument, as such.

This was a bill filed in the chancery court at Trenton, upon the facts and for the purpose stated in the opinion. At the January Term, 1853, chancellor JONES, presiding, there was a decree for the complainant, and respondent appealed.

M. & H. BROWN, for complainant, argued: The gift is to the children in these words: "to take effect at the termination of my natural life, I retaining the *property* of said slaves during my life." This language, in express terms, forbids the construction that any thing passed before the death of the donor. The absolute property remained in him; nothing therefore passed until his death. See the cases cited 2 Meigs' Dig., page 1038, § 1991; 1 Williams on Ex., 86-7, late edition; see *Taylor vs. Taylor*, 2 Humph., 597.

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The cases cited by defendants are all conveyances of *present* interests, reserving the *use*, merely; of this class are the cases of *Caines vs. Marly*, 2 Yer., 582; and *Duncan and wife vs. Adm'rs. of Parish Self*, 1 Murphy, 466.

The case before the court allows no such construction. The *conveyance* is to take effect *at the donor's death*. This is in express terms; and then, to make the meaning more explicit, if possible, the donor retains the "property of said slaves" during his life. *No present interest passed*. The gift was to his children at his death; that is, to such of them that might be *then living*.

RAINS, for respondent.

CARUTHERS, J., delivered the opinion of the court.

John Walls, in his lifetime, executed, acknowledged and committed to registration, in the county of Rutherford, an instrument in the following words:

"Know all men by these presents that I, John Walls, of the county of Rutherford, State of Tennessee, in consideration of the natural love and affection I bear my children, Solomon, Ryland, Hiram and Malinda Walls, have transferred and conveyed unto them the following slaves for life, namely: Green, Clem, Harry, Edmund and Nancy and her increase. To have and to hold said slaves unto the said children, their heirs and assigns, to take effect at the termination of my natural life, I retaining the property of said slaves during my life. Witness my hand and seal this 1st day of April, 1840.

JOHN WALLS, [seal.]"

[Walls' *adm'r.* vs. Ward.]

Defendant, Ward, bought the interest of some of the children, and by a division of the slaves made by the chancery court at Trenton, in 1849, the negro boy, Green, was assigned to him. This was after the death of John Walls.

This bill is filed by the administrator claiming the boy, Green, upon the ground that the above instrument is a testamentary paper, and consequently that this, and the other slaves belonged to his intestate at the time of his death, and are subject to the regular course of administration, the payment of debts, &c.

It may be remarked that there are no creditors before the court, and in this suit we cannot know that any exist. We can only consider it as a contest between the personal representative of Walls, and one claiming under his deed. The deed, then, must operate against the complainant just as it would against his intestate, so far as the rights of those claiming under it are affected. There being no creditors or subsequent purchasers in this suit, proposing to contest the validity of this title, it is to be considered as a suit by the donor himself. He must be bound by the express words of his deed. And his administrator standing in his shoes, has no other rights than those possessed by his intestate at the time of his death. Then, as by the express words of his deed, the title of the donees "is to take effect" at his death, he only "retaining the property of said slaves" during his life; what right or property was there left to pass to *an administrator*? Very different questions might arise in favor of creditors, or subsequent purchasers. Whether they could prevail against the title of defendant derived under this deed, would depend upon circum-

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stances, which do not appear in this record, and upon which we give no opinion.

But the ground upon which this suit is placed by the complainant, is, that the deed of his intestate, can only be regarded as a testamentary paper, and therefore conveys no title as against creditors, but can only take effect after they are satisfied; that the children can only claim as legatees, and not as donees of the remainder. Perhaps the answer already given, that the complainant, as administrator, cannot make that question, as the law was when this suit was brought, would be sufficient. The administrator must take up the rights of his intestate as he finds them, and cannot disregard his conveyances of property, even for fraud, either in law, or in fact. But, if this paper were regarded as a will, it would, by no means, follow, that the complainant, as administrator of an intestate, could prevail. It is said that this instrument, be it what it may, disposes of all the property of the deceased. It is here presented, duly authenticated, as a deed, and acknowledged on all hands, to be the act of John Walls. The title either passed out of him to the remainder in this property, at the date of the deed, according to the construction of defendant, or it passed under the paper as a will, as contended by complainant's solicitor. Now, the complainant's rights rest entirely upon the fact of an intestacy. He is not executor, or administrator with the will annexed. If it be a will, it is believed that no one can recover the property disposed of by it, unless he is legally appointed to act under it, or be a creditor, or purchaser, or claim under a title hostile to that of the deceased. Here, the very ground upon which the complainant claims, is, that Walls made a will bequeathing this property to his children, and

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yet, his right to recover as administrator, or to administer at all, rests solely upon the fact that he made no will, but died intestate. It will be observed, that the validity of this paper is not controverted on either side. It is admitted to be good as a deed, or a testament. The complainant does not insist that it is invalid; but that being a testament, by legal construction, it only carries the title to the property subject to the debts. It is no sufficient answer to this view of the case, that it is no bar to the recovery of complainant, as administrator, because it has not been proved as a will. The law provides a mode, by which any one interested in its probate, if it be a will, may coerce its production for that purpose; act 1794, ch. 1, § 47. Although it may be true, that no one could assert any rights under it, as a will, without probate, yet we think that its production, under the circumstances of this case, is sufficient to defeat the complainant's right of recovery. It is, in form, a deed; proved and registered as such; was so intended by the maker, and its character can only be changed, if at all, by construction of law. This change cannot be made by Walls, or complainant, if it could by others.

But we do not consider it a testamentary paper. It could not have been so intended by the maker. His object certainly was, to make an absolute conveyance of the slaves, subject to a life estate in himself. The donees are "to have and to hold said slaves" unto them, their "heirs and assigns." Yet it is to take effect at the termination of the donor's "natural life," and he "retains the property of said slaves during his life." Although such is not the literal import of these restrictive words, yet, taken in connection with the whole instrument, they can only mean that the use of the slaves during his life, is

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reserved. Any other construction would place it in his power to defeat the gift entirely, by giving, selling, or willing them to others. He certainly intended to secure the property, after his death, to the designated objects of his bounty, and not to mock them with false hopes. To give the paper immediate effect, and make clear his intention, he acknowledged, and had the paper registered, according to the requisitions of the law, on the subject of deeds of gift. No ground is left for creditors to complain, because the deed was made public by registration. Since the case of *Caines & Wife vs. Marley*, 2 Yerger, 582, decided in 1831, by this court, the law has been well settled to be, that "a deed of gift of slaves, to take effect after the death of the donor, is valid," and that "the delivery of possession is not essential to the validity of a gift, where the gift is evidenced by writing." In *Cains vs. Jones*, 5 Yerger, the same rule is recognised.

The English law, of former times, to the contrary, in relation to personal property, by which the entire interest went with the life estate, because a remainder could not be created in personal property, has long since been changed, both there and here; 2 Yerger, 583; 2 Kent's Com., 258. The law being clear, then, that a remainder may be limited on a life estate, or that the reservation of a life estate, or the use for life, in a deed conveying the remainder to another, is good and valid in law, the only difficulty arises from the application of the principle to a particular deed.

It is here argued, that it does not apply to this case, because the gift is not to take effect till the death of the donor, and that he retains the *property*, as well as the *use*, for life. Therefore, it is contended, that no property vested in the donees till the death, and con-

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sequently the instrument can only take effect as a will. We cannot concur in this construction; it is only a difference in words, and not in ideas. The writer of the deed must be taken to have meant by the language used, to convey a present right to the remainder to his children. The right to the property was then given and vested, but not to take effect in possession, nor to be beneficially enjoyed until his death. This is the plain, common sense meaning of the instrument; the evident intention of the donor; and is not, we think, in conflict with any technical rule of law. The contrary construction would make the deed contradictory and absurd. By it, the deed would be made to give a complete right to the property to the donees, in the body of it, and then reserve the whole property to himself in a subsequent clause. This would make the latter clause void according to the rule of law applying to the construction of deeds; which is, that where there is an irreconcilable conflict between a prior and subsequent clause, the latter must fall and the former stand. The maker of a deed will not be allowed to say: "I inserted a clause, or condition, destructive to your supposed title, and you take nothing;" 5 Yerger, 254; 4 Cru. D., 329; Martin's N. C. R., 28; 2 Yerger, 584.

The case of *Watkins vs. Dean*, 10 Yerger, 321, is a fair illustration of that class of cases to which the doctrine contended for by complainant's counsel, applies. The principle there decided, is, that an instrument which does not purport to convey any property of which the maker was owner at its date, but gives the one half, as in that case, or any other proportion, or all the property which he may own at his death, is, although in

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form, a deed, testamentary in its character, and can only operate and take effect as a will. But, in the case before us, the property was then in possession, and described; and the donees in being, and named; the paper in form, a deed, intended to take effect as such, duly proved and registered. Nothing is relied upon to change its character, but the fact that no beneficial interest passed until the termination of a life. To carry the doctrine on the subject of converting papers, not so intended, into wills, by construction, would be tantamount to a negation of the right to create a remainder in property, to be enjoyed after the death of the owner. This right is well settled, and where it is exercised in good faith, should be favored, as it often tends to preserve property to children, which would otherwise be wasted by unthrifty parents, who are generally induced to make such settlements under some strong equity, as in the case now before us.

The decree must be reversed, and the bill dismissed.

Lessee of STEWART et als. vs. HARRIS.

LIMITATION OF ACTIONS. *Act of 1819, ch. 28, § 1. Probate and registration of deed.* Seven years possession of land under a deed purporting to convey an estate in fee, whether the same be proved and registered in the manner directed by the statutes or not, or whether it be registered at all or not, invests him who is in possession with a perfect legal title, except as to persons under disability; in virtue of which, he may support or defend the action of ejectment.

This was an action of ejectment in the circuit court of Obion county. At the February Term, 1853, FRIZZGERALD, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

COCHRAN, for plaintiff in error.

TOTTEN, J., delivered the opinion of the court.

This is an action of ejectment for the western half of a one thousand acre tract of land, in Obion county, granted to Edward Harris. The defendant was admitted to defend in the room and stead of the tenants in possession. The judgment was in his favor, and the plaintiff has appealed in error to this court.

At the trial, the lessors of the plaintiff showed title in themselves, to the land in dispute. Thereon, the defendant proved that he claimed to be the owner of the one thousand acre grant; and in October, 1836, leased the same to one A. G. Cummins, and put him in possession. The lease is in writing, and for the term of eight years. The defendant also exhibited in proof, a tax sale deed for the one thousand acre grant, executed to him by the sheriff of Obion county, 10th November, 1837, purporting to convey an estate in fee, in virtue of a sale for the non-payment of the public tax for 1835.

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This deed was proved before the county court of Obion, April Term, 1838, and registered. It was read without exception to its competency, as evidence at the trial in the circuit court, and no exception, on that ground, is taken in this court. There is much evidence tending to prove, and we think, satisfactorily, that defendant has had a continuous, adverse possession of the premises, by tenants holding under him, directly or mediately from the date of the lease to Cummins, until the institution of this suit, a period of more than seven years.

It is now argued by the counsel for the plaintiff, that the probate of the sheriff's deed was void, for want of jurisdiction in the county court to take it; the clerk of that court having, by statute, the exclusive jurisdiction on that subject; 1835, ch. 53, § 6. That the deed is, therefore, to be considered as not well registered, or as not registered at all. And he insists, that a deed not registered is not such an assurance of title as is contemplated by the first section of the Act of 1819, ch. 28; because, in our law, a title by deed is not considered to be perfect until it be registered; and that the registration is necessary to give notice of the extent of the tenant's claim.

It is true that a perfect legal title will not pass by deed, until it be registered; 1715, ch. 38, § 5. This act supersedes, to a great extent, the common law conveyances, and introduces a new system. But it has been held that an unregistered deed vests in the grantee an equitable title, and something more; it vests in him an inchoate legal title, which becomes perfect by the registry of the deed.

The action of ejectment cannot be maintained upon an unregistered deed; for, that action, where it depends

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upon the title, can only be supported upon a pure legal title. But the act of limitation, 1819, ch. 28, does not require that the deed be registered. If the tenant hold under a deed or other assurance of title, purporting to convey an estate in fee, and his possession be continuous, adverse and exclusive, for a period of seven years, he becomes thereby invested, by the operation of the statute, with a perfect legal title, except as to persons under disability. It operates both upon the remedy and the title. The title of the tenant rests, not upon the registry laws, but upon the deed and the adverse possession. That is all that the statute requires; and it is imperative in its provisions, to the effect we have stated. We cannot require that the deed or other assurance of title be registered before the statute shall operate, unless we assume to interpolate a new fact into its provisions; which, of course, we have no power to do.

This statute, therefore, in the given case, has the effect to vest the legal title in the person in whose favor it may operate; and he may support or defend the action of ejectment, in virtue of such title, in like manner as in the case of a registered deed.

As to the notice insisted upon, the possession of the tenant is sufficient to put the owner of the land upon enquiry as to the nature and extent of the title claimed by the tenant in possession.

Other inferior questions have been alluded to in argument, but we are satisfied that there is no error in the record, and order the judgment to be affirmed.

Judgment affirmed.

HILL vs. MILLER et al.

WITNESS. Competency. Interest in the event of the suit. The interest which renders a party incompetent as a witness must be either a legal, certain and immediate interest in the event of the cause or in the record for the reason that it will be legal evidence for or against him in another suit. A remote, uncertain or contingent interest will not disqualify, neither will a mere honorary obligation. Nor can it be left to the opinion of the witness to decide whether or not he is competent; this is a question exclusively for the court upon the facts of the case.

This was an action of assumpsit in the common law and chancery court of the city of Memphis. As stated in the opinion the material facts will be found in the report of this case in 10 Humph., 470. At the November Term, 1852, HARRIS, Judge, presiding, there was judgment for the defendants and the plaintiff appealed in error.

THORNTON & MASSEY and BLUME, for plaintiff in error.

WRIGHT & TURLEY and YEEGER, for defendants in error.

McKINNEY, J., delivered the opinion of the court.

This case was before us at a former term, but not upon the questions now presented. For a statement of the material facts, we refer to the report of the case; 10 Humph., 470.

In the progress of the trial, the plaintiff introduced Nathaniel Anderson as a witness, to prove that S. G. Dunn was a part owner of the boat, "Lady of Lyons," in the year 1843, and for some time thereafter. But the witness objected to being examined on the ground, "that he was himself, at one time, a part owner of

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said steamboat, and sold his interest therein to said Dunn; and if said Dunn were liable in this action, *he* (the witness) *considered himself bound to the same extent.*" And thereupon the court ruled that the witness was not bound to testify in the cause.

In this we think the court erred. It is too well settled to admit of discussion, that the interest which disqualifies a witness, must be either a legal, certain, and immediate interest in the event of the cause; or, interest in the record, for the reason that it will be legal evidence for or against him, in another suit. A remote, uncertain, or contingent interest, will not disqualify; neither will a mere honorary obligation, where no legal obligation, in fact, exists. Nor can it be left to the opinion or judgment of the witness to decide, whether or not he is competent; this is a question exclusively for the court, upon the facts of the particular case. The presumption is in favor of competency, and the contrary must be satisfactorily shown; and if it be left doubtful, the objection will only go to the credit of the witness; 1 Greenl. Ev., §§ 386 to 390.

The statement of the witness in the present case, shows no interest; no facts are stated from which such a conclusion can be deduced; the exclusion of the witness rests alone upon the ground, that *he considered himself interested.*

The judgment will be reversed, and the verdict set aside as to both defendants.

BOYD *vs.* MOSELY.

SALE OF GOODS. Delivery. A delivery of goods to a common carrier, to be by him transported to the buyer, is a delivery to the buyer, as the carrier is the agent of the buyer, and receives the goods for him.

SAME. Same. Stoppage in transitu. When goods have been delivered by the seller to a common carrier, to be by him transported to the buyer, the property becomes vested in the buyer, subject to the seller's right of stoppage *in transitu*; but this right of the seller is gone if, before it is exercised, and after the delivery, other *bona fide* rights intervene; as if the buyer sell the goods or they be legally attached for debt.

SAME. Vendor's lien. The lien of the seller of goods for the price thereof, does not exist after he has parted with the possession.

This was an action of replevin in the common law and chancery court of the city of Memphis. At the March Term, 1853, HARRIS, Judge, presiding, there was judgment for the defendant, and the plaintiff appealed in error.

THORNTON & MASSEY, for plaintiff in error, argued: That Boyd had an unquestionable right at the time of the attachment levied, to retain the goods until the price was paid or tendered, not in virtue of the right of stoppage *in transitu*, but on the higher and older doctrine of *lien for the price*. Though the *property* in the goods may have been passed by what had been done, yet the *actual possession* and *control* of the goods were *still* with Boyd, and he could assert his *lien*. This is a *lien*, and it is unlimited and unconditional as long as the goods are under the *control of the seller*. It is subject to none of the qualifications which attach to the right of stoppage *in transitu*; Story on Sales, ch. 9, §§ 281, 282, 283-4, 286, &c.; Kent's Com., 496 (3), also, 492, (mar.); *New York Fire Insurance Company vs. De Wolf*, 2 Cow., 57; *Bloxam vs. Saunders*, 10 Eng. Com. L. R., 477, 479; *Hanson vs. Meyer*, 6 East, 614; Opin-

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ion of Lord Loughborough, 625; *Chapman vs. Lathorp*.
6 Cow., 110, 112; *Potter vs. Coward*, Meig's R., 22.

T. S. AYRES, for defendant in error.

TOTTEN, J., delivered the opinion of the court.

Replevin for goods; judgment for the defendant, and appeal, by the plaintiff, to this court.

It appears that in May, 1851, Thomas Koen, of Holly Springs, a grocer, sent his order by mail to the plaintiff, a grocer at Memphis, to forward by first conveyance, four barrels of whiskey, one barrel of brandy, one keg of wine, &c., and at the same time, enclosed to the plaintiff one hundred dollars to be placed to his credit on account. Before and after this time other orders and remittances of like character had been made, and at the date of this transaction the balance of account was in favor of the plaintiff, who had full confidence in the credit and solvency of Koen. The goods were put up, marked "T. Koen, Holly Springs," and placed on the wagon of a common carrier, at the plaintiff's door, but the carrier's receipt was not taken. It was the custom at Memphis, in such case, to take the carrier's receipt; and there is proof, both ways, to the question, whether goods were considered as delivered before the receipt was taken.

The goods were thereon seized by defendant, as sheriff of Shelby, in virtue of an attachment in his hands against Koen, at the instance of a creditor of Koen, and claimed to be liable as his property. They were then replevied by the plaintiff; and it is now argued for him,

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First, that the title had not passed to the buyer, because the delivery was not complete; and second, that the seller had a *lien* upon the goods until the price was paid or tendered.

As to the delivery, we think it was complete; for, it is clear, that a delivery to the carrier is, in effect, a delivery to the buyer; and he may maintain an action against the carrier if the goods be lost or injured. He is, in fact, the agent of the buyer and receives the goods for him. By this delivery the property becomes vested in the buyer, subject only to the seller's right of stoppage *in transitu*, which is an equitable right, not inconsistent with the former, and consists in reserving the possession of the goods, while *in transitu*, and retaining them until the price be paid. But this right is gone, if other *bona fide* rights intervene, before it be exercised; as, if the buyer sell the goods or they be legally attached for debt, as in the present case. Nor is the case affected by the circumstance that the carrier's receipt had not been given, when the goods were attached. It was proper that it be given, but it is merely evidence of the fact that a delivery had taken place. The custom of Memphis, in this respect, is not material, as it has nothing to do with the law of the case.

As to the right of lien for the price of the goods, that is a legal right, founded in possession; and it cannot exist after the seller has parted with his possession; *Newson vs. Thornton*, 6 East., 21; *Lickborrow vs. Mason*, 2 T. R., 63.

We have seen that the delivery was complete when the goods were placed in possession of the carrier; and the right of lien, which consists in possession, was then at an end.

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His honor, the circuit judge, instructed the jury correctly upon the subject of a delivery of the goods; but erroneously as to the seller's right of stoppage *in transitu*. This error, however, was in favor of the plaintiff, and is no cause of reversal here.

Let the judgment be affirmed.

APPERSON vs. LOONEY.

ATTACHMENT. *Justice of the peace. Jurisdiction.* By the act of 1852, ch. 157, § 2, jurisdiction, by attachment, to the extent of five hundred dollars, is expressly given to justices of the peace.

The judgment of the circuit court of Shelby county, in this case, from which the plaintiff prosecuted a writ of error, was rendered at the May Term, 1852, HUMPHREYS, Judge, presiding.

A. H. DAVIDSON, for plaintiff in error.

BROWN & CARUTHERS, for defendant in error.

CARUTHERS, J., delivered the opinion of the court.

The attachment issued in this case, on the 8th April, 1852, stating the indebtedness of defendant to be four hundred and twenty-eight dollars, and that he had removed, or was about to remove himself, or his property.

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beyond the limits of this State. It was made returnable before a justice of the peace, who gave judgment for the amount claimed, after the replevy of the property. Appeal was taken to the circuit court, where the proceedings were quashed. Writ of error to this court.

The only ground upon which the judgment of the circuit court is sustained, in the argument here, is, that a justice of the peace has no jurisdiction by attachment, for the amount claimed, and for which judgment was rendered, but that the process should have been made returnable to the circuit court where the case was alone cognizable.

The jurisdiction of magistrates by process of attachment was very limited until it was enlarged by the act of 1843, ch. 29. It was not extended by implication under the various acts increasing the amount over which these officers had cognizance by warrant, as had been decided by our courts. At the time of the passage of the act above cited, the amount was two hundred dollars, as fixed by the act of 1837, ch. 22. The seventh section of the act of 1843, provides "that the jurisdiction of justices of the peace in cases of attachment shall be co-extensive with their jurisdiction in cases of warrant." By the act of 1850, ch. 269, it was extended to five hundred dollars. Now, the question made in argument, is, that this last enlargement is only by warrant, and not by attachment; that the act of 1843, must be confined to the amount over which justices of the peace then had jurisdiction, which was only two hundred dollars. The legislature do not thus confine and limit it in words. The language of the act is general, and it is, with great plausibility, to say the least of it, contended that any subsequent extension of jurisdiction, without reference to

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the process by which the suit might be commenced, would embrace cases of attachment. We would not, however, be inclined to enlarge this jurisdiction by construction, as it is subject to very great abuse, being generally carried on without any notice, in fact, to the defendant. But on that question we now give no opinion, as it is unnecessary for the decision of this case.

By the Act of 1852, ch. 157, § 2, we think the jurisdiction to the extent of five hundred dollars, is expressly given to justices of the peace by attachment. The Act of 1843, § 7, seemed to confine the enlargement of jurisdiction by this process, to cases of non-resident and absconding debtors. The act of 1852, was expressly made to amend that section. In the 1st section, the case of debtors removing, or being about to remove, is embraced. The second section makes the process "returnable before a justice of the peace, if for an amount within his jurisdiction; if not, then to the circuit court." As at that time the jurisdiction of a magistrate was five hundred dollars, we cannot but regard the legislature as intending to make the jurisdiction by attachment co-extensive with that by warrant under the then existing law.

Let the judgment of the court below be reversed, and the cause remanded for further proceedings.

JOYCE *vs.* THE STATE.

HOMICIDE. Evidence. Name of person slain. The prisoner was indicted for the murder of "William Trammel." On the trial, the witnesses did not prove that the christian name (there being no contest as to the name) of the deceased was "William;" he was spoken of as the "deceased," or "Trammel;" the verdict of the jury was a conviction for the murder of "William Trammel." Held that the conviction was proper.

The prisoner was indicted in the circuit court of Shelby county. The venue was changed to Fayette county, and at the February Term, 1853, of the circuit court for that county, HUMPHREYS, Judge, presiding, there were verdict and judgment against the prisoner, and he appealed in error.

YERGER and W. T. BROWN, for prisoner.

ATTORNEY GENERAL and J. L. T. SNEED, for the State.

CARUTHERS, J., delivered the opinion of the court.

This is an indictment for the murder of William Trammel. Trial and conviction in the circuit court of Fayette of murder in the second degree, and ten years imprisonment in the penitentiary. Motion for new trial overruled, and appeal to this court.

It is objected here that there is no proof in the record showing that the christian name of the deceased was William. He is spoken of by all the witnesses as the "deceased," or "Trammel." The argument is not placed upon the ground of a variance between the name proved, and that in the indictment; but that the proof fails to show that the deceased bore the name of William, or any other christian name.

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We think this objection entirely too technical, and is insufficient in reason or law, as a ground upon which to disturb the verdict. In case of a variance between the name in the indictment and that proved, the law might be different. But here it does not appear that any question was made as to the given name of the deceased; no effort made to show that he bore a name different from that stated in the charge. We think it too late, after conviction to raise that question. But, in the verdict of the jury, the defendant is found guilty of the murder of "William Trammel," as charged in the indictment. There is no doubt raised in any part of the proof, as to the true name; that any other man by the name of Trammel, lived or died in that county; the witnesses all referred to the deceased, as Trammel, or the man that was slain, and for the murder of whom the defendant was on trial. The jury certainly had proof enough to find that the man upon whom the murder was committed, was named William.

Judgment affirmed.

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ABATEMENT BY PLEA.

See PRACTICE, 5.

ACTION.

1. *Unlawful detainer.* The remedy by an action for unlawful detainer is proper, where the party in possession of land has obtained his possession under a verbal contract of purchase, and afterwards repudiates the agreement with his vendor and assumes to hold for himself. *Beard vs. Bricker*, 50.
2. *Joinder of Parties.* Since our statute which makes all joint contracts, in effect, joint and several, and permits the plaintiff to proceed against so many of the parties or obligors as he may think proper, the plaintiff may sue upon several bonds jointly those who are obligors in each of the several bonds, although there may be other obligors, some of whom have signed one bond and some another. *Trustees of McMinn Academy vs. Reneau et als.*, 94.
3. *Debt upon judgment.* *Administrator de bonis non.* An administrator *de bonis non*, may maintain an action of debt upon a judgment recovered in the name of the executor who preceded him. *Smith, adm'r., vs. Pearce*, 127.

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4. *Proceedings before Justice of the Peace.* While it is true that the court will not regard the mere forms of proceedings before justices of the peace, yet the two classes of action, *ex delicto* and *ex contractu*, cannot be blended or united together, and a recovery cannot be had under the one form if the action be of the other. *Beasley vs. Bradley et al.*, 180.
5. *Employer and employee. How and to what extent the person employed shall recover compensation or damages if discharged by his employer.* A person hired to perform a particular service, during a stated period and for a specified price, if he be discharged from service by the hirer, may, upon his contract, recover the full price stipulated to be paid him if it does not appear that he was discharged for sufficient cause, or that within the period for which he was hired he was admitted into the service of another person. In the event the person hired has been admitted into the service of another, the measure of damages to be recovered by him in an action against his employer upon the contract, will be the amount stipulated in the first instance, less the amount agreed to be paid by the second employer, or, in the absence of an agreement, the value of the services. In the event the person hired be discharged for sufficient cause, he may, notwithstanding, recover upon a *quantum meruit* the value of the services rendered his employer. *Jones vs. Jones*, 605.

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ADMINISTRATOR.

Pleading. Jurisdiction. In an action against an administrator or executor, he may plead "fully administered," "no assets," or "not sufficient assets," and the plea may be tried in the forum where the action is pending. If in the circuit court, by a jury: if before a justice of the peace, then by the justice.

ADMINISTRATOR—*Continued.*

The judgment, however, in such case, if in favor of the administrator, is not conclusive against the heirs in a proceeding against them to subject the land descended to them to the payment of the debt. They may, to a *scire facias* issued for that purpose, plead that the administrator had assets, &c. *Anderson vs. Lessee of Clark's heirs*, 156.

See ACTION, 3. FORCIBLE ENTRY AND DETAINER, 2. LIMITATION OF ACTIONS, 4.

ADVERSE POSSESSION.

Slaves. If several persons living together under the same roof and as one family, have a mixed concurrent possession of slaves, the presumption of law is, that each holds consistently with his own right, as also with the right of the others, and that the possession is with the right; and this presumption will prevail though it appear that one of the family, who assumes to be the head of the family, should exercise ordinary acts of ownership over the slaves, or calls them "his slaves," or is even permitted by the other members of the family to pledge one of them for his own debt. *Foster et als. vs. Jordan et als.*, 476.

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ANTE-NUPTIAL CONTRACT.

See CONSTRUCTION OF WRITINGS, 4.

APPEAL.

1. *Chancery. Original bill and cross-bill.* An appeal from the decree of the chancery court rendered upon

APPEAL—*Continued.*

a cross-bill, opens the whole case presented both by the original bill and the cross-bill, though there be no appeal from the decree dismissing the original bill. *Woodrum et als. vs. Kirkpatrick et als.*, 218.

2. *Certiorari and Supersedeas.* The petitioner for writs of certiorari and supersedeas to remove a cause from before a justice of the peace into the circuit court, alleged the following as reasons for not appealing: that the services of Hill, a justice of the peace, had been engaged to manage and conduct the suit as the friend and agent of petitioner (he being old, blind and ignorant) who advised him, when he attended at the proper time to take the appeal, not to do so, as the case would go the same way in the circuit court. The advice was taken, but the petitioner afterwards ascertained that he had sat upon the case and united with the other justice, Nelson, in giving judgment against him. *Held* that this was a sufficient reason for not appealing, and the petition containing matters showing merit, it was proper to grant the writs of certiorari and supersedeas. *Allen vs. Primm*, 337.
3. *Chancery.* If the party dissatisfied with a decree of the chancery court, final as to all the objects of the suit, appeal therefrom and afterwards dismiss his appeal, whereupon the cause is remanded to the chancery court to be further proceeded with, in controlling the management of a trust fund involved, he is bound by the decree from which he had so appealed and cannot have any error therein corrected, or take any other step to amend by introducing new parties. The only remedies left him are a writ of error or a bill of review. *Franklin vs. Franklin et als., & Franklin vs. Hays et als.*, 521.

See SUMMARY PROCEEDING, 4.

APPRENTICE.

1. *County Court.* *Act of 1762, ch. 5, § 19.* The statute of 1762, does not otherwise limit the extent of the

APPRENTICE—*Continued.*

provisions in favor of an indented apprentice, than by fixing the minimum that shall be required of the master ; and it is therefore held, that it is the duty of the county court, in acting for infants and orphans, under this act, to secure for apprentices, so far as they can, the most liberal provision and compensation from the master. *Finch, Chairman, &c. for the use of Thomas vs. Gore*, 326.

2. *Same. Bond.* Though a bond taken under the act of 1762, ch. 5, § 19, is made payable to a person who is at the time chairman of the county court, but who is not so described in the statement of the parties to the bond, or by his signature thereto ; yet, if his official character be stated in the bond, it is a good statutory bond. Nor is it necessary to constitute it a good statutory bond under this act, that it should be made payable to the chairman, "or his successors." *Ibid.*

ARBITRATION AND AWARD.

1. *Mistake of the arbitrators.* Where it clearly appears upon the face of an award, or by the evidence of the arbitrators, that in making the award, there was a mistake in a matter of fact, it is a valid objection to the award. *Conger vs. James*, 213.
2. *Award must be final.* While it is true that an award may be good in part only, yet to be valid, it must be mutual or final. Hence where work has been done by one party for the other, and payments have been made therefor, and the matter is submitted to arbitrators to determine the value of the work and the amount of the payments, the award is void if it state the value of the work and omit to determine the amount of the payments. *Ibid.*
3. *Practice.* When an award which is to be made the judgment of the court, is submitted for that purpose, if the award be void for want of mutuality, the court cannot (upon the admission of the party in whose

ARBITRATION AND AWARD—*Continued.*

favor the award is that the other party is entitled to credits not given him in the award, and because of which the award is defective,) correct the award and render judgment upon it as corrected.

ARREST OF JUDGMENT.

1. *Supreme court. Act of 1852, ch. 152, § 7.* The act of 1852, ch. 152, § 7, which declares that the supreme court shall not arrest judgments "for any defect or imperfections in matters of form," applies to all cases brought into the supreme court after the act went into effect, though the suits may have been instituted before the statute was enacted. *Corn and wife vs. Brazelton*, 273.
2. *Pleading. Practice.* A plea in these words: "Def't plead not guilty," though but the mere name of a plea, and might be treated as a nullity, yet, if the plaintiff take issue thereon, it is a waiver of the objection, and the judgment will not, because of the defectiveness of the plea, be arrested. *Ibid.*

See PROSECUTOR, 1.

ASSAULT AND BATTERY.

Former conviction. If a party be charged with an assault, and convicted thereof, he cannot afterwards be punished for the battery committed at the same time. *The State vs. Chaffin*, 493.

ASSUMPSIT.

See USE AND OCCUPATION, 1.

ATTACHMENT.

1. A proceeding under the statutes of Tennessee, authorizing attachments, may be prosecuted, though the plaintiff, in this State, is, at the same time, prosecuting a suit in the chancery court of another State, for the purpose of bringing to sale there, property of his debtor, for the satisfaction of the same debt. *Lockwood & Co. vs. Nye et als.*, 515.

ATTACHMENT—*Continued.*

2. *Justice of the Peace. Jurisdiction.* By the act of 1852, ch. 157, § 2, jurisdiction, by attachment, to the extent of five hundred dollars, is expressly given to justices of the peace. *Apperson vs. Looney*, 664.

See PRACTICE, 3. MECHANIC'S LIEN, 4. REMAINDER, 1.

ATTORNEY'S FEES.

Not recoverable in an action for mesne profits. The costs which may be recovered in action for mesne profits are only the legal and proper costs taxed in the action of ejectment, not including attorney's fees. *White vs. Clack*, 230.

AUTHENTICATION OF DEED.

1. *Act of Congress of 1804, and Statute of Tennessee of 1811, ch. 76.* In order to make effectual as evidence a Virginia grant for lands, which, according to the provisions of the Act of 1803, ch. 58, will be recognized as a valid muniment of title, the Register of the Land Office of the State of Virginia should certify under his seal of office, (or if there should be no seal he should so state,) and the Governor should attest that the certificate is in due form and made by the proper officer. *Lessee of Brock et als. vs. Burchett*, 27.
2. *According to the common law.* To authenticate the grant according to the common law form, the Governor's certificate, under the great seal of the State, should itself verify the copy. The attestation of the official character of the officer whose certificate purports to verify the copy is not sufficient. *Ibid.*

BANKRUPT.

1. *Petition for writ of supersedeas.* The petition of a bankrupt for the writ of supersedeas, to stay the collection of a debt, from the payment of which he has been discharged under the act of Congress of 19th August, 1841, need not aver that the debt was not incurred by the bankrupt in "a fiduciary capacity." In such pe-

BANKRUPT—*Continued.*

tion, the averments must be certain only to a "common intent." *Dick & Co. vs. Powell*, 632.

2. *Judgment rendered against him after the filing of his petition in bankruptcy.* The certificate of discharge under the act of Congress of 19th August, 1841, applies to judgments obtained against the bankrupt after he filed his petition in bankruptcy, if the judgment be upon a debt which he owed at the time of filing his petition. The judgment is not a new debt, but a new security given by the act of the law, for the same debt. *Ibid.*

BILL OF EXCEPTIONS.

When to be taken and signed. Practice. A bill of exceptions relates to matter excepted to at the trial and ascertained before the verdict. It is not requisite that it be formally signed before the trial is at an end; it is sufficient if the exception be taken at the trial and noted by the Court, and it may, during the term, be reduced to writing and signed by the judge, or the judge may, in a special case, make an express order, allowing a further time to prepare it. *Ferrel vs. Alder, adm'r.*, 77

BOND.

See APPRENTICE, 2. SHERIFF, 4.

CERTIORARI AND SUPERSEDEAS.

Practice. When the certiorari is resorted to merely for the purpose of correcting an abuse of the execution issued by a justice of the peace, it is in the nature of an *audita querula*, and if the petition be dismissed the court should award a procedendo to the justice in whose office is the judgment, as the judgment in such case remains in full force, not being affected in any manner by the certiorari. *Jones vs. Williams*, 105.

2. *When available as a remedy.* The remedy by writs of *certiorari* and *supersedeas*, can be resorted to as a

CERTIORARI AND SUPERSEDEAS—*Continued.*

substitute for an appeal, only when it is stated in the petition for the writs, that an appeal has been defeated either by the oppressive or erroneous act of the court, or justice of the peace; by the wilful or negligent act of the clerk; by the contrivance or procurement of the adverse party; by inevitable accident; or, by the blameless misfortune of the petitioner. Hence, it is not a sufficient reason for not appealing from the judgment of a justice of the peace, that the petitioner did not know, or suspect, until the time within which he might have appealed had expired, that the paper upon which he was sued was a forgery. *McMurry vs. Milan*, 176.

3. *Practice.* Upon a motion to dismiss a petition for writs of certiorari and supersedeas, which have already been granted, no extrinsic evidence should be heard by the court, either presented by affidavits or otherwise, to falsify the statements contained in the petition. The judgment, upon the motion, must depend upon the sufficiency of the facts stated in the petition to authorize the granting of the writs. The cases of *King vs. Rutherford*, 1 Ten. R., 191, and *Stewart vs. Hall*, 2 Ten. R., 179, are overruled. *Studdert vs. Fowlkes*, 537.

See POOR, 1. APPEAL, 2. BANKRUPT, 1.

CHAMPERTY.

1. *Adverse possession. Non-resident vendor.* A non-resident may lawfully sell and convey lands belonging to him in this State, though the land be held adversely at the time of the sale, if that possession be a mere naked possession without title. This is so by force of the terms of the second proviso to the first section of the champerty act of 1821. *McCoy's lessee vs. Williford*, 642.
2. *Same.* A contract by bond, for the sale and conveyance of land, entered into *bona fide*, at a time when no adverse possession existed, may be executed by a

CHAMPERTY—*Continued.*

deed of conveyance to the obligee in the bond, or to his assignee, after an adverse possession has commenced. And this rule prevails though the assignment of the bond was after the adverse possession had commenced. *Ibid.*

CHANCERY.

1. *Judgment. Notice.* The purchaser of property sold under a decree of the chancery court, becomes a *quasi* party to the cause, so far as relates to the rights and duties that properly appertain to his purchase under the decree; and hence, if he fail to pay the purchase money or any part thereof, at the time it becomes due, the court may, upon motion, and without any notice to him, enter judgment and award execution against him for the purchase money remaining unpaid. *Blackmore vs. Barker et als*, 340.
2. *Pleading. Amendment.* If the defendants to a bill in chancery plead the want of proper parties as complainants, and the plea should be allowed, the court should still permit an amendment by adding new parties, if the complainant, who has filed the bill, has himself, an interest in the proceeding, and is a necessary party. *Franklin vs. Franklin et als.*, 521.
3. *Trust, and trustees.* If one who is charged with the management of a trust fund, and has the legal title thereto, be incapable, in consequence of infirm health, to devote such attention to the trust as its magnitude demands, the chancery court may, without divesting him of the legal title to the funds, appoint suitable persons to perform the active duties of trustee. *Id.*
4. *Injunction. Private way.* Assuming that the county court has the constitutional authority to open a private way, yet a court of chancery will not interpose by injunction to prevent the owner of the land over which the way is granted, from placing and continuing in the way such obstructions as would make it

CHANCERY—*Continued.*

useless for the purpose intended, if it appear that the way was opened without reference so much to the interests of him over whose land it passed, as to the interest and convenience of him for whose benefit it was ordered to be opened. To authorise the interposition of the injunctive power of the court in such case, it must appear that in locating the way the least possible injury that could be, consistently with the end to be attained, is done to the owner of the land. *Clack vs. White*, 540.

5. *Jurisdiction.* When a cause, which is exclusively of legal jurisdiction, (e. g., a question of damages for libel and defamation,) has been tried at law, and a judgment rendered against the defendant, and it appear that there was no fraud or concealment by the plaintiff at law, a court of chancery has no jurisdiction to interfere to relieve the defendant. *White vs. Cahal's adm'r.*, 550.

See PARTIES, 1. APPEAL, 1, 3. FRAUD, 1. SALE OF LAND, 3, 4.

CHARGE OF COURT TO JURY.

See HOMICIDE, 2. DEVISAVIT VEL NON, 2, 3. CRIMINAL LAW, 1.

CLERK OF CIRCUIT COURT.

Motion against, under Act of 1852, ch. 256, § 12. Parties. County Trustee. The motion against a clerk authorized and directed to be made by Act of 1852, ch. 256, § 12, should be made in the name of the County Trustee. *Ellis vs. Rogers et als.*, 64.

See SUMMARY PROCEEDING, 2, 3, 4, 5.

COLLEGES.

See LIMITATION OF ACTIONS, 5.

COMPENSATION.

See CONSTITUTIONAL LAW, 2.

CONFLICT OF LAWS.

Domicil. Husband and wife. It is well settled that where the husband and wife at the time of the marriage, have different domicils, the law of the husband's regulates the marital rights as to moveable property. If the husband have no domicil, then the law of that of his wife would govern. *Layne, ex'r. &c. vs. Pardee and wife*, 232.

CONSIDERATION.

See CONTRACT, 1.

CONSTITUTIONAL LAWS.

1. *Retrospective laws.* The act of 1842, ch. 169, § 4, though it be construed as applicable to wills made before its passage (the testator being alive at the time of its passage) is not in conflict with the declaration of rights, Art. I, § 20. *Wynne's lessee et als. vs. Wynne*, 405.
2. *Compensation to owner of property which has been taken for a public use ; how, and in what way to be made.* Where the legislature, in the exercise of the power conferred by the constitution, assumes to appropriate the property of a private individual to a public use, in the construction of a rail road, it cannot prescribe how much, and in what way the owner shall be compensated for the property so appropriated. The value of the property taken, must be assessed by a just and proper tribunal, and the amount paid *in money*. It is a debt against those who take the property, and must be paid as all other debts. The owner thus deprived of his property, cannot be coerced to receive as compensation, ameliorations of his remaining property, or the enhancement of its value, nor any other "benefit or advantage," either real or imaginary, that may be conferred upon him. The measure of the compensation to be made to the owner in such case, is the fair cash value of the property taken, at the place, and in the form

CONSTITUTIONAL LAWS—*Continued.*

taken; the incidental damages or benefits which are to result to him from whom the property is taken, from the use to which it is to be applied, form no element in the computation of the compensation. So far as such incidental benefits and damages are involved, the legislature may make such regulations as are deemed proper, in the way of placing one as a set-off against the other. *Woodfolk vs. Nashville & Chattanooga Railroad Company*, 422.

3. *Private ways.* *Act of 1811, ch. 60.* The act of 1811, ch. 60, conferring upon the county court authority to open private roads is repugnant to the constitution and void. *Clack vs. White*, 540.

See FORCIBLE ENTRY AND DETAINER, 1. CORPORATION, 3.

CONSTRUCTION OF WRITINGS.

1. *Will.* Testator, Thomas Brown, made the following bequest: "To my wife I give all my household furniture and farming tools of every description, and the one half of all my stock of every description, not disposed of; and I give her the following negroes, to-wit: Manuel and his wife, Nancy; big Phil; Samuel and Nancy, his wife; boy, Henry Clay; Malinda and child, Winston; and after her death, (if not disposed of by her,) after her death to go to the children of Mary Caroline Sevier, (after her death,) and the use and benefit of my man Handy, during her life, with the use and benefit of my land and ferry her life time, and Arch and wife." *Held* that an unlimited power of disposal is conferred upon Mrs. Brown by this clause, and that a remainder, created to depend upon the non-disposition of an estate by the first taker, who has an unlimited power of disposition, is void. *Sevier et als. vs. Brown*, 112.
2. *Will.* The testatrix made the following devise: "I will that all my estate, both real and personal, which

CONSTRUCTION OF WRITINGS—*Continued.*

may come to the hands of my executors for the use and benefit of my daughters, Levisa Saunders, Catharine Campbell and Celia Stone, remain in the hands of my executors, in trust for my said daughters during their natural lives, and to the heirs of their bodies forever." To which will there was this codicil: "In pursuance of my last will and testament, it is my desire that my young negroes already devised by will be divided as follows, to wit: To my daughter, Levisa Saunders and the heirs of her body, negro girl, Polly," &c. *Held* that the clause of the will above quoted fixed and controlled the rights of Levisa Saunders and the other legatees, and that the codicil only designated what particular property each legatee should take under the restrictions and limitations of the will, and that Levisa Saunders took only a life estate in the property. *Ward, adm'r vs. Saunders et als.*, 174.

3. *Will.* The will of the testator contained the following provisions: "My will and desire is, that all my negroes, not otherwise bequeathed, shall be valued and put into lots and divided amongst all my children; the ones drawing the most valuable lots to pay over to the less valuable the difference in cash, share and share alike." Again: "My will and desire is, that all my land be sold by my executors, hereinafter mentioned, to the highest bidder, on twelve months credit, and the proceeds to be equally divided between my wife and children. It is my will and desire that the portions or lots which are, or may be assigned to Jane Woodrum and Mary Welsh, my daughters, shall be held by them for the benefit of the heirs of their bodies, not subject to be sold, bartered, or traded by their husbands." *Held* that by the first clause above quoted, Jane Woodrum was vested with an absolute estate in her portion of the slaves, and that by the last clause quoted, this estate is to her sole and separate use. *Woodrum et als. vs. Kirkpatrick et als.*, 218.

CONSTRUCTION OF WRITINGS—*Continued.*

4. *Ante-nuptial contract.* M. F. Dickson, in contemplation of marriage with Henry Baldwin, made a conveyance of all her property to a trustee, to secure the same to her sole and separate use, in which it is provided that she "shall have full power and authority, by her direction in writing, under her hand, in the presence of one or more witnesses, to alienate, sell, dispose of or invest the negro slaves, debts, money or other property, in any way or manner she may think proper; and also, to bequeath or devise the same by her last will and testament, with the power, from time to time, to appoint any other trustee, or agent, for the management of said negroes, debts, and other property. It is further agreed, by the parties to these presents, that the said negroes and their increase, shall remain in the possession of said Mary F., or in the possession of any one she may choose; and that she may, by her directions in writing, as aforesaid, or otherwise, appropriate as she may think proper, the hire or labor of said negroes, or their increase, and also the interest and profits arising from the monies due her from time to time, and at all times hereafter; and that she may dispose of said negro slaves and their increase, and of her monies, debts due her, and other property, by any deed, or deed of gift, or other mode of conveyance, according to her own wishes and pleasure." *Held* that under this instrument Mrs. Baldwin retained the power to dispose of the property as she might choose, and having this unrestricted power, she could execute a mortgage. *Hoggatt vs. White*, 265.
5. *Will.* A testator devised a tract of land thus: that it "be equally divided among my children, William E. Morton, John S., Sarah N., Geo. W., Thomas R., or to as many as are alive when divided." From this devise it manifestly appears that none other than the children named should participate in the devise; and in the event of the death of either before the devise

CONSTRUCTION OF WRITINGS—*Continued.*

should take effect, the issue of the one so dying, should not represent the parent in the devise. *Morton vs. Morton et als.*, 318.

6. *Deed. Trust. Limitation of actions.* R. M. Smith conveyed to "William Yancey, his heirs, executors," &c., a negro slave, Jim, and other slaves, in trust, for the separate use of the wife of said Smith; the trustee to hire, or control the slaves for her interest, and, [in the words of the deed,] "after her death, the said negroes, with their increase, if any, to be equally divided between all her children." *Held* that where the subject of the trust is personal estate, the deed creating the trust may receive a more liberal construction, conformable to the true and actual intention of the instrument, than is admissible where it is real estate, limited to the technical and artificial language appropriate to that kind of property, and hence in this case the estate of the children, construing the deed by the rule stated, was a vested legal remainder, and upon the death of the tenant for life, the legal estate would cease to be in the trustee, at which time, and not until then, a right of action would accrue to the children to recover the slaves from those who might have them in their possession. *Smith et als. vs. Thompson*, 386.
7. *Will. Act of 1843, ch. 169, § 4.* The testator made the following devise: "I give to my much beloved wife, Martha Wynne, all the balance of my property, both real and personal, to have and to hold to her own benefit, to the exclusion of all others." *Held* that it was clearly the intention of the testator that all real property, held by him at his death, whether acquired before or after the date of his will, should pass to his wife, and that under the act of 1842, ch. 169, § 4. lands acquired after the date of the will did so pass. *Wynne's lessee et als. vs. Wynne*, 405.
8. *Will.* The testator's will contained the following provisions: "I loan to my beloved wife, Martha Wil-

CONSTRUCTION OF WRITINGS—*Continued.*

liams, the following property, to wit:” (sundry slaves) “during her natural life.” And all his other property after paying his debts. “The condition of the above loan is such, that if the said Martha Williams should think proper to marry, or dispose of this property in any manner whatever, so that Thomas Jones, Margaret Jones, Rebecca Andrews, Elizabeth Jones, nor either of them nor their heirs shall never enjoy any of the above named property, nor money, nor have anything to do with it, in any manner whatever, then the above loan to be void, or else stand in full force and virtue. It is my desire that no misconstruction be laid on this, my last will and testament, so as to deprive my wife, Martha Williams, of a bona fide title to the above named property, and the increase thereof forever; provided that she should manage it in such manner that neither of the above mentioned” persons, “nor neither of their heirs shall never inherit any part of my estate. But if she should not dispose of this property so as to deprive” said persons “nor their heirs, then this loan to take effect.” *Held* that under this will the widow took an absolute estate, which she might dispose of by will or deed, to the excluded persons, or others, at her pleasure. *Williams vs. Jones et als.*, 620.

9. *Gift of slaves, by deed, to take effect at the death of the donor, he retaining “the property of the slaves” during his life.* Walls, in his lifetime, executed, acknowledged and committed to registration, the following instrument: “Know all men by these presents, that I, John Walls, of the county of Rutherford, State of Tennessee, in consideration of the natural love and affection I bear my children, Solomon, Ryland, Hiram and Malinda Walls, have transferred and conveyed to them the following slaves for life, namely: Green, Clem, Harry, Edmond and Nancy, and her increase. To have and to hold said slaves unto said children, their heirs and assigns, to take effect at the

CONSTRUCTION OF WRITINGS—*Continued.*

termination of my natural life; I retaining the property of said slaves during my life. Witness my hand and seal, this first day of April, 1840. John Walls, [seal.]" Ward bought the interest of some of the children, and by a division of the slaves, after the death of Walls, one of them became his. The administrator of Walls brought suit in equity, to recover the negro set apart to Ward. *Held* that the instrument above quoted, is not a testamentary paper, but a deed, by which the right to the property was given to, and vested in his children, at the time of the execution of the deed, but not to take effect in possession, or be beneficially enjoyed, until his death, and that in a contest between the administrator of the donor, (no creditor of the donor, or subsequent purchaser being a party,) and a purchaser from the donee, effect would be given to the instrument, as such. *Walls' adm'r vs. Ward*, 648.

CONTINUANCE.

Practice. At the first term at which a case stands for trial, either party may continue it upon a general affidavit, but at the second term, whether or not the case was continued at the first term by affidavit, the continuance because of the absence of witnesses, should only be granted upon special affidavit, in which must be disclosed the facts to be proved, as well as the names of the persons by whom they are expected to be proved. *Javan Nelson vs. The State*, 482.

CONTRACT.

Consideration. Distribution. Upon the assumption that, prior to the Act of 1839, ch. 48, land settled upon a child by an intestate in his life-time, was not subject to be collated in the division of personal estate among the distributees of the intestate; yet, if the child to whom land has been given prior to the passage of that statute, agree in writing with his co-distributees, (for the purpose in the language of the

CONTRACT—*Continued.*

agreement, of settling the division of the estate equitably and amicably,) that each of the distributees shall bring into the account for division any property received by him or her from the intestate during his life, or from his estate after his death, such agreement is supported by a sufficient consideration, and the land so advanced, should, by virtue of the agreement, be collated in the division. *Farnsworth vs. Dinmore et als.*, 38.

See MECHANIC'S LIEN, 2.

CORPORATION.

1. *Charter—construction of.* The 5th section of the charter of the Nashville and Kentucky turnpike company, provides that the company "may establish toll gates, not exceeding seven in number, at such points as the directors may designate." Under this provision, the directors have power to establish any number of gates less than seven. And though the charter of the company confers and imposes the same rights and duties as those stated in the charter of the Franklin turnpike company, (the seventh and tenth sections of which charter limit the number of gates to two for the first seven miles, and to one at and for every succeeding five miles,) yet as the provisions of the two charters are dissimilar and inconsistent, with reference to the location of gates, and cannot stand together, that of the Nashville and Kentucky turnpike company must prevail. *Louisville and Nashville Branch Turnpike Company vs. Nashville and Kentucky Turnpike Company*, 282.
2. *Discretionary powers conferred upon the corporators—how determined.* Where the charter vests the corporators with discretionary power in reference to the exercise of a particular right, and in the exercise of the discretion so conferred they make an election, this election is final and conclusive. Notwithstanding this is so, however, the corporation may, if it choose, abandon the use or enjoyment of the right

CORPORATION.—*Continued.*

secured by the election, if no detriment thereby accrues to the public. *Ibid.*

3. *Constitutional law.* The cases of *Mayberry vs. The Corporation of Franklin*, 6 Humph. 368, and *Washington vs. The Mayor and Aldermen of Nashville*, 1 Swan, 177, re-affirmed. *Whyte vs. Mayor and Aldermen of Nashville*, 364.
4. *Powers. Nashville.* The powers conferred upon a corporation must be exercised in conformity with the law of its creation; and hence the corporation of Nashville has no power to delegate to any one or more members of the board of Aldermen, authority to give notice, to such citizens as they may select, to construct foot pavements in front of their lots, and in the event of failure to make such pavements within the time fixed by a by-law of the corporation, to have them made at the expense of the owner of the lot. This is a power conferred upon the corporation which cannot be delegated. *Ibid.*

See MISNOMER, 1.

COSTS.

1. *Taxation of, where the judgment is against one, and for others of several joint defendants.* Where there are joint defendants, one of whom is acquitted and the others are not, the defendant who is acquitted may recover of the plaintiff such costs only as accrued *separately* and properly on account of his being a defendant in the suit, and the plaintiff is entitled to recover of the other defendants the costs of the suit incurred in the joint defense, or otherwise, except such as may be separated therefrom, as having exclusive reference to the defendant who is discharged. Where the defendants sever, the general rule of the Act of 1794, ch. 1, § 74, applies. *Sloan vs. Parks et als.*, 62.
2. *How and by whom to be paid, when the plaintiff joins several causes of action by means of several counts,*

COSTS—*Continued.*

and recovers upon some, but fails upon others. Practice. Where a plaintiff joins several causes of action by means of several counts in his declaration, and recovers as to some of the counts, but fails as to others, he can recover only such costs as are incident to that count of the declaration upon which he succeeds; while the defendant is entitled to recover such costs as have accrued in consequence of the counts upon which the plaintiff has failed. In such case, the proper practice is to render judgment and award execution in behalf of the defendant, for such costs as he may be thus entitled to recover. *Allison vs. Thompson, adm'r., 202.*

3. *Motion.* A motion against a sheriff, for an "insufficient return," is, in substance, or legal effect, a suit or action, and hence, in such a proceeding, the clerk should include in the bill of costs, the State tax provided by the Act of 1848, ch. 161, § 10. *The State vs. Allison, 373.*
4. *Prosecutor.* The mere fact that the grand-jury ignore a bill of indictment, is not sufficient evidence that the prosecution is frivolous or malicious, to authorise the court to tax the prosecutor with the costs of the prosecution. The statutes authorising this to be done intend that the facts must appear from the proof on the trial. *Frazer vs. The State, 535.*

COUNTY COURT.

See ROAD, 1. APPRENTICE, 1, 2.

CRIMINAL LAW.

1. *Charge of the court to the jury.* Upon the trial of a prisoner charged with murder, the court charged the jury in these words: "The jury are not only the judges of the facts in the case, but they are the judges of the law. The court is a witness to them as to what the law is. After the court has stated the law to them, then, if they believe it to be different, they can disregard the opinion of the court. If the judge

CRIMINAL LAW—*Continued.*

is against the defendant his judgment can be reversed by the supreme court; if the jury err in favor of the defendant, their judgment is final, and cannot be reversed by the supreme court." There is no error in so charging a jury in a criminal case. *Javan Nelson vs. The State*, 482.

2. *Jurors. Competency.* The mere fact that a person has an opinion; has "made up his mind;" as to the guilt or innocence of the prisoner, does not render him incompetent as a juror; as it is not the existence of the opinion, either way, which constitutes the disqualification, but the grounds upon which it is formed. Hence, upon a trial of two slaves who were charged with the murder of their master, persons were held to be competent jurors, one of whom, upon the trial of his competency by the court, stated that "he had heard that Peck's negroes had killed him; that he believed it, and does now; and could not do otherwise, as he had the evidence of the country. And on the facts aforesaid, he had formed an opinion which he now entertains. That it was upon rumor he formed this opinion. That he has a bias upon his mind, and has had it ever since, from these circumstances;" and the other of whom stated that "he had formed an opinion upon mere rumor; that the rumor was the common chat of the neighborhood that Peck's negroes had killed him; that he believed the rumor then and now; and upon it formed his opinion which he now entertains." *Alfred and Anthony vs. The State*, 581.
3. *Pleading.* Double pleading is not allowable in criminal cases. So if a party pleads a former conviction and also not guilty, the latter plea should be treated as a nullity. *The State vs. Copeland*, 626.
4. *Giving spirituous liquors to slaves.* To convict one charged with giving spirituous liquors to a slave, in violation of the Act of 1852, ch. 174, § 10, it must be both averred and proved that the defendant was

CRIMINAL LAW.—*Continued.*

at the time, a grocer or retailer of spirituous liquors.
The State vs. Bradshaw, 627.

See RETAILING LIQUORS, 1. HOMICIDE, 1, 2. INDICTMENT, 1, 2. PROSECUTOR, 1. ROAD, 1. MALICIOUS SHOOTING, 1. EVIDENCE, 3, 4, 5, 13. NEW TRIAL, 3. RAPE, 1. VERDICT, 1, 2, 3. ASSAULT AND BATTERY, 1.

DAMAGES.

See SLANDER, 1.

DECLARATION.

See HUSBAND AND WIFE, 3.

DEEDS.

Date of. Estoppel. When a party has deliberately and intentionally inserted in a deed a false date, expressly with a view to the accomplishment of a particular purpose, he is estopped to aver or prove a different date from that set forth on the face of the instrument. *Kimbrow vs. Hamilton, adm'r.*, 190.

See AUTHENTICATION OF DEED, 1. EVIDENCE, 2. CONSTRUCTION OF WRITINGS, 6.

DELIVERY.

See SALE OF PERSONAL PROPERTY, 1, 2, 3.

DEMURRER.

See LOST INSTRUMENT, 1.

DEPOSITION.

1. *Exceptions to. Practice.* Exceptions to the reading of a deposition, unless for intrinsic cause, must be specifically made when the deposition is proposed to be read, or they will not be available in the supreme court. *Hodges vs. Nance*, 1 Swan, 57; *Whitley vs. Davis*, *Ibid*, 333. *Oliver vs. Bank of Tennessee*, 59.
2. *Exceptions to, by the party who has taken it.* If a witness, in reply to an inquiry of the party who is taking his deposition, answer the question, and add statements which are not necessary to be made, as a

DEPOSITION—*Continued.*

part of his answer, and which would be illegal if offered as evidence by the opposite party, the party taking the deposition may, on the trial, have that portion of it excluded from the jury. *Smithwick & Co. vs. Anderson*, 573.

DEVISAVIT VEL NON.

1. *Pleading. Practice.* While it is true that a will may be contested as to some particular clause, or as to some particular bequest, yet, if the contestants plead specially, as to particular portions of the will, denying such to be the will of the testator, and also plead generally, denying the entire script to be the will of the testator, the court may, without error, strike out the special pleas. Under the statutes upon the subject, no particular form of pleading is necessary in making up the issue of *devisavit vel non*. All that is necessary, is, that the paper should be propounded and averred to be the will, by the executors, and a denial that the affirmation is true, by the contestants. The general issue, in such case, brings the will as a whole, and all its parts, into contest. *Harrison et als. vs. Morton & Brown, ex'rs., &c.*, 461.
2. *Charge of the court.* Upon the trial of a general issue of *devisavit vel non*, should the circuit court charge, that if the jury believe there was fraud or mistake, in the making of one or more of several clauses of a will, they should render a verdict for the contestants, it is not such error as would authorise the court to grant a new trial upon the application of the contestants. *Ibid.*
3. *Same.* The court, in charging a jury upon the trial of an issue of *devisavit vel non*, is not required to charge as requested in writing, by the counsel, if the propositions submitted to the court for that purpose, are irrelevant to the case, as made out by the proof

DEVISAVIT VEL NON—*Continued.*

which has been submitted to the jury, or are inapplicable to the issue, however appropriate they may be in the determination of questions arising out of a construction of the will, by a proper tribunal. *Ibid.*

4. *Evidence.* Upon the trial of an issue of *devisavit vel non*, parol proof can not be admitted to show that the testator intended to make any other disposition of his property than such as is directed by the will, that he was deceived as to the legal import of the will; or that there was a mistake of the draftsman, if it clearly appear that the will was read over correctly to the testator, before it was signed, and he was capable of understanding its provisions. *Ibid.*

DEVISE.

After acquired lands. Act of 1842, ch. 169, § 4. The act of 1842, ch. 169, § 4, applies as well to wills made before the passage of the act, if the testator were living at the time of its passage, as to wills to be made afterwards. *Wynne's lessee et als. vs. Wynne*, 405.

DILIGENCE.

1. *Of officer in preservation of property attached or levied upon.* An officer who has seized property by virtue of an attachment, must use such ordinary diligence in preserving it, (so long as he should retain the custody of it,) as belongs to a prudent and honest discharge of his duty; but what shall amount to the degree of care and diligence required, must depend very much upon the facts of each case. *Snell et als. vs. The State, for the use of Greenfield*, 344.

See SHERIFF, 2.

DISTRIBUTION.

See CONTRACT, 1. LEGITIMATION, 1.

DIVORCE.

Act of 1835, ch. 26, § 1. To authorize a divorce for

DIVORCE—*Continued.*

the cause stated in the act of 1835, ch. 26, § 1, it must be averred in the petition and verified by proof, that the desertion or absence of the party, against whom the complaint is made, is wilful and malicious, and without reasonable cause. The malice intended by the statute, is not malice *in law*, but malice *in fact*; that is, an enmity of heart, or unprovoked malignity toward the person deserted, and there being no other cause, this state of mind prompts the desertion or absence. *Stewart vs. Stewart*, 591.

DOMICIL.

Change of. To constitute a change of domicile, an intention to change is not sufficient; the fact and the intention must concur. *Layne, ex'r. &c., vs. Pardue and wife*, 232.

See CONFLICT OF LAWS, 1.

DOWER.

Character of the estate and charges to which it is liable. There is nothing peculiar to a tenancy in dower, which distinguishes it, with respect to taxes and other incidental charges upon the property, from other estates of freehold for life. Standing in the place of her husband, the doweress must necessarily be held subject to the charges, duties and services to which the estate may be liable. She is seized of the freehold, and is, properly speaking, *owner* of the estate to the extent of the assignment in dower. *Whyte vs. Mayor and Aldermen of Nashville*, 364.

ELECTIONS.

1. *When to be held in each civil district, and effect of omission as to any one of the districts.* The failure of the sheriff, (or coroner, as the case may be,) to open and hold an election in each one of the civil districts of a county, will vitiate the election of a circuit court clerk. *Marshall vs. Kerns*, 68.
2. *Evidence. Certificate of the officer who holds the election.* The certificate of the coroner who holds an

ELECTIONS—*Continued.*

election, is *prima facie* evidence of the election, yet, it is competent to falsify the certificate by the testimony of witnesses. *Ibid.*

3. *Contest. Parties.* The incumbent of an office, or any citizen of the county interested as a citizen in the appointment, may be permitted to offer legal opposition to the investment with a county office of one who claims it under a void election. *Ibid.*

ENDORSEMENT.

See NEGOTIABLE PAPER, 1.

ENDORSER.

See WITNESS, 4.

ESCHEATS.

1. *How disposed of.* By the Constitution of Tennessee, Art. XI, § 10, all escheated property of every description whatever is appropriated to common schools, and by the act of 1835, ch. 23, escheated property shall on demand be delivered to the "Board of Commissioners of Common Schools," "to dispose of in such manner as they may deem best for the common school fund." *Hinkle's lessee vs. Shadden*, 46.
2. *Sale of land. Parties.* A sale of land made under a decree of court for the purpose of paying the debts of an intestate, is void, unless the parties upon whom the law casts the estate are before the court. Hence the sale of escheated land so ordered is void unless the "Board of Common School Commissioners" is a party to the proceeding. *Ibid.*

ESTOPPEL.

The State bound by the acts of its public agents. A final settlement, made by a public officer of the State with another officer who is supposed to be in default, which is made in pursuance of a statute, and which received the approval of the Legislature, estops the State afterwards to disregard the settlement and sue

ESTOPPEL—*Continued.*

for monies alleged to have been due before the settlement. *The State vs. Crutcher's adm'r.*, 504.

See DEED, 1.

EVIDENCE.

1. *Declarations of a nominal party made after he has parted with his interest in the subject matter of the suit.* The declarations or admissions of a party, though nominal plaintiff in the suit, made *after* he has parted with his interest in the matter, and another party has acquired the exclusive right in the same subject matter, cannot be admitted in evidence to disparage the right or title of the latter, however it may affect the party himself making such declarations or admissions. *Moyers for Smith's use vs. Inman*, 80.
2. *Recitals of a sheriff's deed.* Recitals in a sheriff's deed that the purchaser, at the sale, had assigned his interest acquired by the purchase, to another person, and he to another, and that he (the sheriff) was ordered to make title to each successively, are to be taken as presumptive evidence that the sheriff was authorized to execute the deed to the last assignee. *Anderson vs. Lessee of Clark's heirs*, 156.
3. *Prisoner's examination by the committing magistrate.* The examination of a prisoner by the magistrate before whom he is brought for commitment, being a privilege extended to the prisoner, so that he is thus "allowed to speak for himself," the record of that examination cannot afterwards be used by him, upon his trial, as evidence in his defense. *Nelson vs. The State*, 237.
4. *Statement of witnesses before the examining magistrate.* The record of the evidence of witnesses before the examining magistrate, can only be used upon the trial of the prisoner for the purpose of discrediting a witness who has been examined both before the magistrate and upon the trial, and then only when the

EVIDENCE—*Continued.*

witness has been interrogated as to what he said before the magistrate. *Ibid.*

5. *Res gestæ. Declarations of prisoner.* The declarations of a prisoner are not admissible as part of the *res gestæ*, unless they are made at the time of the act, which is being investigated, and which they are calculated to characterize; "they must so harmonize and be connected with the act, as to constitute a part of it." *Ibid.*
6. *When illegal evidence is permitted to go to the jury, how it should be withdrawn.* If illegal evidence be permitted to go to the jury, the error can only be obviated by some act of the court, amounting to its withdrawal. The statement of counsel to the jury, that a verdict is not sought to be obtained upon the evidence, so admitted, does not cure the error. *Decherd vs. Morrison*, 305.
7. *Sheriff and surety.* The declarations of a sheriff made after the return day of an execution, cannot be heard as evidence against the surety of the sheriff, in an action against surety alone for the failure of the sheriff to pay over money by him collected upon the execution. Such declarations, to be admissible, must be made at a time and under circumstances to constitute them a part of the *res gestæ*. *Trousdale, Gov. &c., vs. Philips*, 384.
8. *When a party may except to the testimony of his own witness.* Should a witness, in answering a question, proper in itself, propounded by the party calling him, state matter illegal and not in response to the question, the party calling the witness may except to the testimony, and upon his exception the court should exclude so much of the answer as is improper, from the jury. *Morgan vs. Winston*, 472.
9. *Record of a judgment in a former action.* In an action upon a covenant of warranty of the soundness of a slave, the plaintiff cannot introduce as evidence

EVIDENCE—*Continued.*

the record of a judgment recovered against him, because of the unsoundness of the slave, by one to whom he had sold, (subsequent to his own purchase, from defendant,) with warranty of soundness. *Ibid.*

10. By the statute laws of Virginia, any widow, possessing slaves, as of the dower of her husband, who removes the slaves beyond the limits of that State, without the consent of the reversioner, forfeits "all and every such slave, and all other the dower which she holds of the endowment of her husband's estate unto the person or persons that shall have the reversion thereof." It is held that if the doweress and her daughter (though the daughter be under twenty-one years of age and a feme covert,) who is the reversioner of the estate, together with her husband, remove from the State of Virginia, at the same time and as one family, the consent of the reversioner to the removal of the slaves will be so far presumed as to cast the burden of proving the contrary on the reversioner, or the creditor of the reversioner who seeks a satisfaction of his debt by a sale of the estate, so alleged to have reverted. *Foster et al. vs. Jordan et als.*, 476.
11. *Declarations of one not a party to the action.* While it is true as a general rule that the declarations of a person made after he has parted with his interest in the subject matter of litigation cannot be received to disparage the title or right of a party acquired in good faith, previous to the time of making such declarations, still this principle is inapplicable to cases of fraudulent sales of property. *Carnahan vs. Wood*, 500.
12. *Same.* The declarations of one who is not a party to the suit but who has had the actual possession of slaves, (the right to which is the subject matter of the litigation,) may, in connection with his acts of ownership, be admitted to show the character of his possession; whether or not it has been such as to vest

EVIDENCE—*Continued.*

a title in him by reason of a continued adverse possession for three years. *Ibid.*

13. *Examination of prisoners by a committing magistrate.*

If a prisoner be cautioned by the committing magistrate that whatever he may say, upon his examination by the magistrate, may be used against him, and that he is not bound to criminate himself, but that it is his privilege to submit to an examination or not, at his option; then the confessions made by the prisoner, which are reduced to writing by the magistrate, may be read as evidence against the prisoner upon his trial; subject to be impeached, however, as is other testimony. *Alfred and Anthony vs. The State*, 581.

See DEVISAVIT VEL NON, 4. HOMICIDE, 1, 2. GRANT, 1. SLANDER, 1. NEGOTIABLE PAPER, 1. ELECTIONS, 2. ROAD, 1.

EXAMINATION OF WITNESSES

See PRACTICE, 7.

EXECUTION.

1, *Lien.* An execution gives to the plaintiff a lien upon the personal property which the debtor may have, between the date of its test and its issuance. *Evans vs. Barnes*, 292.

2. *Levy. Waiver.* The levy of an execution upon the personal property of the debtor, vests the title to the property, in the officer making the levy; and this title will remain in the officer, unless it appear by clear and distinct proof, that the plaintiff in the execution has waived his right to a satisfaction of his debt by a sale of property. The mere fact that the property is levied upon in virtue of one execution, which is returned and sold under an *alias*, does amount to such waiver. *Ibid.*

See SALE OF LAND, 5. JURISDICTION, 1. POOR, 1. WIDOW, 1. SHERIFF, 3.

EXECUTORS.

Contracts of, with reference to slaves belonging to the estate they represent. Specific performance. An executor cannot sell slaves belonging to the estate of his testator, unless so directed by the will, or by the decree of some court, empowered, in proper cases, to order a sale; and hence, a court of chancery will not decree the specific performance of a parol agreement of an executor for the sale of slaves belonging to the estate, which is not in pursuance of a written contract made by the testator. *Simpson vs. Peck's ex'rs*, 54.

See LIMITATION OF ACTIONS, 4.

FORCIBLE ENTRY AND DETAINER.

1. *Constitutional law. Revivor.* The act of 1850, which authorises the revival of actions of forcible entry and detainer, in the name of the heir or legal representative of the deceased party, is, as to such cases as were pending at the time of its passage, retroactive in its operation, and is, that far, unconstitutional and void. *Tucker et als. vs. Burns*, 35.
2. *Parties. Administrator.* An administrator may properly bring an action of forcible entry and detainer, in his representative character, when the cause of action has accrued in the lifetime of his intestate, and the estate of his intestate was a chattel interest. *Winningham, adm'r, vs. Crouch*, 170.

See ACTION, 1.

FORMER CONVICTION.

See ASSAULT AND BATTERY, 1.

FRAUD.

Marriage. Chancery. It matters not how fraudulent may be the motives which may prompt parties to enter into a contract of marriage, or what may be the consequences resulting from such marriage, as affecting the rights of third persons; if the marriage be in compliance with the forms of law, and with the full consent of the parties, they being capable of con-

FRAUD—*Continued.*

tracting, the chancery court has no power, upon the application of a third person, either to dissolve the bonds of matrimony, or to relieve against any of the consequences which result from the marriage. *McKinney vs. Clarke et als*, 321.

FRAUDULENT CONVEYANCE.

Trust deed. An assignment in trust by a debtor, for the benefit of a portion of his creditors, of all his property, of every description, consisting of real and personal estate, and including corn, fodder, bacon, &c., farming utensils, household and kitchen furniture, with a reservation, by the debtor, in the deed, to this effect: "Reserving to myself, however, out of the aforesaid stock, farming utensils, provender, provisions, household and kitchen furniture, so much as I am, by law, allowed to retain free from execution," is fraudulent and void in law, whether so intended or not. *Sugg vs. Tillman et als.*, 208.

GAMING.

1. *Horse racing.* Action to recover back monies lost thereon. *Parties.* Though horse racing under certain restrictions, is so far tolerated by statute as to exempt the parties concerned, from criminal prosecution, still, in all other respects, it is illegal, and no such relation as that of partners, or joint owners, or legal privity of any sort, can be created between the parties. Hence, if two persons join in a wager upon a horse race, which they lose, each must sue separately for his portion so lost and paid over to the winning party. *Wood vs. Owens*, 146.
2. *Horse racing.* Betting upon a horse-race which is not run upon a path kept according to the statutes, for the purpose of turf racing, is an indictable offense. A race path, within the meaning of the statutes which legalise horse racing, is such as is kept under a license, and the payment of an annual tax to the State. *Huff vs. The State*, 279.

GAMING—*Continued.*

3. The jury, upon the trial of a defendant charged with gaming, rendered the following special verdict: "We find that the defendant, with some six or more other gentlemen, played at a game called ten pins, or handicap. In this game no one played to beat any other gentleman, but each one had assigned to him a certain number of pins to get, with a certain number of balls, some more and some less, according as they were considered good or bad players. If the player did not get the number of pins assigned him, he was to treat to a bottle of champaigne. The defendant did play in this game in Maury county, in less than six months preceding the finding of this presentment, and did sometimes, on failing to get the number of pins allotted to him, treat to a bottle of champaigne, and sometimes he did not. It was agreed by the parties at the commencement of the playing, that the treat was a voluntary thing, and no one need to do so unless he was perfectly willing. The jury further find, that the defendant, and the other gentlemen engaged in this play, did not believe it to be gaming." *Held* that these facts constituted the offense of gaming. *Walker vs. The State*, 287.

GIFT.

See SLAVES, 1.

GRANT.

1. *Evidence. Presumption.* A grant may be presumed where a person claiming to be owner has been in possession of the lands for a period of twenty years; but this presumption may be repelled by whatever would rebut the fact of an adverse possession under the statute of limitations. *Lessee of Brock et als. vs. Burchett*, 27.
2. *When and to what extent presumed. Adverse possession.* Twenty years possession under a claim of ownership is presumptive evidence of a grant. If the party in possession, however, have no paper title un-

GRANT—*Continued.*

der which he claims, such as deed, title bond, entry or the like, defining his boundaries, his possession will be limited to his actual occupation or enclosures, and it will not be extended by marked lines merely. The same rule applies in such cases as that which governs in the case of an adverse possession under the act of 1819, ch. 28, § 2. *Collins vs. Hipshire*, 109.

3. *Issued by the State of Kentucky for lands lying between Walker's line and the parallel of 36 deg. 30 min. north. Construction of the statutes of Kentucky of 1824, ch. 64, § 9; 1835, ch. 875, and 1836, ch. 271, § 1.* Though a grant, issued by the State of Kentucky for lands lying between Walker's line and the parallel of 36 deg. 30 min. north, embrace land which has its beginning corner within the boundary of the territory subject to be surveyed by the surveyor of one county, but yet extends into and embraces land in the district subject to be surveyed by the surveyor of another county, the grant is not, for that reason, void, under the statutes of Kentucky of 1824, ch. 49, § 9; 1835, ch. 875, and 1836, ch. 271, § 1. *Parker vs. Claiborne*, 565.
4. *Entry and survey.* Though an entry and survey be defective, yet a grant issued thereon will not, for that reason, be invalidated. In other words, the court in an action of ejectment will not go behind the grant to examine into irregularities and imperfections in the mode of obtaining the grant. *Ibid.*

GUARANTY.

Guarantor's liability. On the 26th January, 1849, A. W. V. executed the following instrument of writing: "I do hereby guarantee the payment of any contract Sam. Lanier may make for the hire of negroes during the year 1849, to be used at his iron works, or any iron works in which he may be interested in Decatur or Perry county, Tennessee." After the date of this guaranty, C. hired to Lanier's agent, six negro men,

GUARANTY—*Continued.*

and the agent executed to him a promissory note for the amount to be paid for the hire. Appended to the note was a memorandum that C. might, at any time, avoid the contract, unless A. W. V. should also sign the note for the hire. At the time of the hiring, C's agent having no knowledge of the guaranty executed by A. W. V., addressed a letter to him, informing him what had been done, and to which he received the following reply: "I have given Mr. Sam'l B. Lanier my written guaranty for the hire of all the negroes he may need at his furnace during the year 1849. The negroes alluded to in your favor of the 29th ult., will, of course, be embraced. You may consider me as bound for the hire of them." Only three of the negroes entered into Lanier's service. A. W. V., after these transactions, in a bill which he had filed in the chancery court, admitted his liability for the hire of negroes employed by Lanier. *Held* that in an action of covenant against A. W. V., on the guaranty of 26th January, 1849, C. might recover the value of the hire of the three slaves. *Vanleer vs. Crawford*, 117.

GUARDIAN.

1. *Ad litem. Appointment.* When infants are to be heard by a guardian *ad litem*, the record should show the appointment of such guardian. *Robertson vs. Robertson et als.*, 197.

See PARTITION, 1.

HOMICIDE.

1. *New trial. Evidence.* When the supreme court, upon a review of the testimony detailed upon a trial for homicide, the result of which is the conviction of the accused of murder in the second degree, is satisfied that the facts of the case are involved in too much doubt and uncertainty to warrant the conviction, a new trial will be awarded. *Garland vs. The State*, 18.

HOMICIDE—*Continued.*

2. *Charge of court to jury.* While it is true generally, that a failure of the circuit court to charge fully, when there is no essential point omitted, or wrongfully charged, is not error, unless it appear that the court was asked for further instructions; still, upon the trial of a capital offense, it is error if the court (although expounding the law correctly so far as the charge goes) omit to instruct the jury fully and explicitly upon the legal effect of all the circumstances developed upon the trial, which would tend to determine the character or degree of the prisoner's guilt. *Nelson vs. The State*, 237.
3. *Evidence. Name of person slain.* The prisoner was indicted for the murder of "William Trammel." On the trial, the witnesses did not prove that the christian name (there being no contest as to the name) of the deceased was "William;" he was spoken of as the "deceased," or "Trammel;" the verdict of the jury was a conviction for the murder of "William Trammel." *Held* that the conviction was proper. *Joyce vs. The State*, 667.

HORSE RACING.

See GAMING, 1, 2.

HUSBAND AND WIFE.

1. *Joint sale of wife's property to discharge the husband's debt.* Though the wife join with the husband in the sale of property bequeathed to her to be held by her to her separate use, and "not to be sold, bartered or traded by her husband," if the sale be made to one who contracts with the husband, and makes the payment to the husband, it is void as to the wife. *Woodrum et als, vs. Kirkpatrick et als.*, 218.
2. *Same. Slaves. Privy examination.* A sale of slaves which are the sole and separate property of the wife, by the husband and wife jointly, without the privy examination of the wife, is void. *Ibid.*
3. *Declaration. Replevin.* In an action of replevin against husband and wife, if the declaration aver

HUSBAND AND WIFE—*Continued.*

that both defendants took and detained the property, it will be supported by proof that the wife took and detained it; and so, if the declaration allege that the wife took and detained the property, a judgment may thereon be rendered against both the wife and husband, both being sued. *Corn and wife, vs. Brazleton*, 273.

4. *Marital right. Slaves.* Upon the marriage of a feme sole, who is vested with a life estate in a given number of slaves, and an absolute estate in an undivided moiety of them, the husband, upon reducing the slaves to possession, becomes the owner of the life-estate of his wife; but his marital rights do not attach to her moiety, until division, whereby his wife may have a complete specific right to the slave, or slaves, set apart to her by the division. *Swanson vs. Swanson*, 446.
See CONFLICT OF LAWS, 1.

INDICTMENT.

1. *Against a public officer.* While it is true that every culpable neglect of duty, enjoined upon a public officer, either by common law or by statute, is an indictable offense, yet the presentment in such case, unless the act of the officer is clearly illegal, must show with sufficient certainty, that it proceeded from corrupt or culpable motives. *The State vs. Buxton*, 57.
2. *Certainty of, in description of offence.* In the description of offences created by statute, or such as are defined, and the punishment of them enlarged by statute, the safest and preferable mode is, to set forth the crime in the words of the statute; as the only effect of too much particularity in the description, except so far as it is necessary for the ends of a proper defense, by a substantial description of the essentials of the crime imputed, is to facilitate the escape of offenders from the just punishment of their crimes, and should not be favored. *The State vs. Ladd*, 226.
See MALICIOUS SHOOTING, 1.

INFANT.

See PARTITION, 1.

INJUNCTION.

See CHANCERY, 4.

INSOLVENT ESTATE.

Set-off. Though the estate of an intestate be insolvent, yet one who is a creditor of the estate and also its debtor, (both debts having been created in the life time of the intestate,) may, in an action upon the claim against him by the administrator, set-off his demand against the estate to its full amount. *Richardson, adm'r., vs. Parker*, 529.

JUDGMENT.

1. *Rendered in another State.* A judgment rendered in one State in pursuance of the laws of that State, is to be regarded as absolutely binding upon the parties thereto, in every other State, until it is either set aside by the tribunal rendering it, or is reversed upon error. *Topp vs. Bank of Alabama*, 184.
2. *Satisfaction of. Negotiable paper.* If the holder of negotiable paper, who has obtained separate judgments against each, the drawer and endorser, receive payment in discharge of the judgment against the endorser, it is, in law, a satisfaction of the judgment against the drawer, and an assignment of the judgment against the drawer to the endorser who has thus been discharged, communicates to the endorser no right to have satisfaction of the judgment. *Ibid.*

See CHANCERY, 1. SUMMARY PROCEEDING, 2, 3.

JUDGMENT BY DEFAULT.

See PRACTICE, 1.

JURISDICTION.

1. *Justice of the Peace. Execution issuing in one county upon judgment rendered in another.* An execution issued in one county upon a judgment rendered in another, in pursuance of the provisions of the act

JURISDICTION—*Continued.*

of 1805, ch. 66, § 4, must recite the fact that it is issued on an execution certified from the county in which the judgment was rendered, and parol or extrinsic proof will not be heard to supply the omission. *Colville vs. Neal & Sellers, adm'rs.*, 89.

See ADMINISTRATOR, 1. CHANCERY, 5. ATTACHMENT, 2.

JURY.

See NEW TRIAL, 2, 3. CRIMINAL LAW, 2.

JUSTICE OF THE PEACE.

See JURISDICTION, 1. PRACTICE, 5. ACTION, 4. ATTACHMENT, 2.

LEGITIMATION.

1. *Effect of. Distribution.* Children not born in lawful wedlock, but legitimated, are, as against the widow of the intestate, entitled to succeed to the personal estate of their putative father, under the statutes of distribution. *Swanson vs. Swanson*, 446.
2. *Construction of statutes on the subject.* The courts, in construing statutes, conferring the right of legitimation, whether they be public or private acts, will give them a fair and reasonable, if not a liberal construction; and hence, though a private act confers upon the persons legitimated, the power to "*inherit*," in the same manner as if they had been born in lawful wedlock," and though the act of 1805, ch. 2, authorising legitimation by the courts, declares the person so legitimated, shall "become heir, or joint heir," of the putative father; still, the words, "*inherit*," "*heir*," "*joint heir*," used in the statutes, must be construed as conferring upon the persons so legitimated, all the rights of inheritance and succession that would attach to them, had they been born in lawful wedlock. *Ibid.*

LEVY.

See EXECUTION, 2. SALE OF LAND, 5.

LICENSE.

See RETAILING LIQUORS, 1.

LIEN.

See MECHANIC'S LIEN. EXECUTION, 1. SALE OF PERSONAL PROPERTY, 4.

LIMITATION OF ACTIONS.

1. *Summary proceedings. Surety.* The statute of limitations applies as well to the remedy given sureties who have paid the debt of their principals, as to the actions of assumpsit or debt. *Butler vs. Winters*, 91.
2. *What promise of the debtor will prevent the bar.* An absolute and unqualified admission of an existing debt which the debtor is willing to pay, or an express promise to pay the debt will obviate the bar of the statute. *Ibid.*
3. *Adverse possession of lands by a judgment debtor, after a sale thereof by the sheriff.* While it is true that a judgment debtor, if he remain in possession of land after a sale thereof by the sheriff, is regarded, in the absence of all evidence to the contrary, as occupying the relation of *quasi* tenant at will to the purchaser; nevertheless, if so retaining the possession, he claims to hold for himself and adversely to the purchaser, for seven years from *the date of the sale* by the sheriff, he is protected, by the statute of limitations, in his possession. This is so, though the action be brought within seven years from the execution of a deed by the sheriff to the purchaser. *Keaton vs. Thomasson's lessee*, 138.
4. *Executors and administrators. Actions brought by the State.* The statutes which limit the time within which suits may be brought against executors and administrators, operate as well against the State as against individual citizens; this conclusion is predicated upon a construction of the acts of 1840, ch. 139, 1715, ch. 48, § 9, and 1789, ch. 23, § 4. *The State vs. Crutcher's Adm'r*, 504.
5. *Lands reserved for the use of schools. Colleges. Act*

LIMITATION OF ACTIONS—*Continued.*

of 1819, ch. 28. The proviso to § 3, act of 1819, ch. 28, declaring "that this act shall have no bearing on the lands reserved for the use of schools," does not prevent the bar of the statute as to lands held by colleges, which were not reserved for their benefit, under the act of Congress, of 1806, ceding lands to the State of Tennessee, for the use of colleges, academies and schools. *Sampson vs. Lessee of University of Nashville*, 600.

6. *Act of 1819, ch. 28, § 1. Probate and registration of deed.* Seven years possession of land under a deed purporting to convey an estate in fee, whether the same be proved and registered in the manner directed by the statutes or not, or whether it be registered at all or not, invests him who is in possession with a perfect legal title, except as to persons under disability; in virtue of which, he may support or defend the action of ejectment. *Lessee of Stewart et als. vs. Harris*, 656.

See CONSTRUCTION OF WRITINGS, 6.

LOST INSTRUMENT.

1. *Affidavit of loss. Demurrer.* In an action of debt upon a lost instrument under the act of 1819, ch. 27, the affidavit of the loss, appended to the declaration, is made a part of the record, and is to be taken as a substitute for proof of the instrument; hence, the sufficiency and validity of the declaration, including the affidavit, may be tested by demurrer. *Carter vs. Vaulx*, 639.
2. *Same.* The affidavit, required by the statute to be made when the action is upon a lost instrument, must be verified before the court in which the action is brought; must also state that the note has not been sold or assigned, and must be made by the plaintiff, or his agent, or attorney, into whose hands the note has been committed, and by whom it has been lost or mislaid. *Ibid.*

MALICIOUS SHOOTING.

Indictment. Description of the offence. In an indictment for malicious shooting, it is sufficient to charge that the accused did, "unlawfully and maliciously shoot," &c. It is not necessary to describe the weapon, the hand in which it was held, the wound that was inflicted, or circumstances attending the act. *The State vs. Ladd*, 226.

MARRIAGE.

See FRAUD, 1.

MECHANICS' LIEN.

1. *Non-resident mechanics.* The statutes which give to mechanics and undertakers a lien upon the building, &c., for the value of their labor or materials furnished for its erection, apply as well to persons who are non-resident as to those who reside within the State. *Greenwood et als. vs. Tennessee Manufacturing Co. and Agricultural School*, 130.
2. *Description of persons and materials not embraced within the statutes.* The statutes which provide a lien for mechanics, &c., do not apply to the merchant who furnishes machinery to be used in a building erected for manufacturing purposes. *Ibid.*
3. *Contract.* The lien given to mechanics should not be defeated by a too rigid construction of the statutes; so that, although the lien is given upon the condition that "a special contract, with the owner of the lot of ground," is made by the mechanic or undertaker, nothing more is required than an employment and undertaking to do the work. *Barnes vs. Thompson*, 313.
4. *Manner of enforcing it. Attachment.* The benefit of the lien given to mechanics, can only be preserved by attachment. *Ibid.*
5. *Journeyman. Notice.* Under the second section of the act of 1846, ch. 118, the journeyman, in whose favor a lien may be created, in order to secure the

MECHANICS' LIEN—*Continued.*

lien, must give notice to the owner or proprietor of the lot upon which the building is to be or has been erected, as the statute provides. If he neglect to do so until the owner pay to the undertaker the price stipulated to be paid for the building, &c., then the lien is defeated. *Brown vs. Crump's adm'r.*, 531.

MERCHANT.

See REVENUE, 1.

MESNE PROFITS.

See ATTORNEY'S FEES, 1.

MISNOMER.

Corporation. Where a bond has been executed to a corporation by a name varying from the true name, the corporation may sue in its true name, and aver the execution to the bond to it. *Trustees of McMinn Academy vs. Reneau et als.*, 94.

MISTAKE.

When money paid under a mistake of facts may be recovered back. When money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if the fact had been known to the payer, an action will lie to recover it back, and this right proceeds upon the ground that the plaintiff has paid money which he was under no obligation to pay, and which the party to whom it was paid has no right either to receive or retain. The party to whom the payment has been made cannot resist the recovery upon the ground of the plaintiff's negligence in availing himself of the means of knowledge within his reach, nor upon the ground that at the time of payment the plaintiff may have entertained and expressed a vague belief, resting on no evidence and amounting to nothing like conviction or moral certainty, that the fact existed

MISTAKE—Continued.

which would exempt him from the payment, nor upon the ground that the plaintiff had *had* knowledge of the fact, if it has been forgotten, as forgetfulness of a fact is ignorance of such fact; the plaintiff, who has thus paid money, may, however, be repelled upon the ground that injury or injustice would be done the defendant in the particular case, were the plaintiff permitted to recover; e. g. where the money is paid not to the original creditor of the party paying, (whose debt had been previously satisfied,) but to a creditor of his, who received the money in good faith, ignorant of the mistake and in satisfaction of a just demand, and who in consequence of such payment may have waived or lost his remedy against his debtor. *Guild vs. Baldridge*, 295.

See ARBITRATION AND AWARD, 1.

MOTION.

See SUMMARY PROCEEDING, 1, 2, 3. COSTS, 3.

MORTGAGE.

Usury. Where property is conveyed by a mortgage deed, to secure the payment of money advanced upon a usurious agreement, the mortgagor may, upon payment of the principal debt, with legal interest thereon, recover back the property. *Hoggatt vs. White*, 265.

NASHVILLE.

See CORPORATION, 4.

NAVIGATION.

See WATERCOURSES, 1, 2.

NEGOTIABLE PAPER.

Endorsee's title not necessary to be proved unless put in issue. Upon the trial of an action of assumpsit by the endorsee of a bill of exchange against the drawer, the plaintiff is not required to prove the verity of the endorsements, unless there be a special

NEGOTIABLE PAPER—*Continued.*

plea, which puts in issue the holder's title to the paper. *Oliver vs. Bank of Tennessee*, 59.

See JUDGMENT, 2.

NEW TRIAL.

1. *Number that may be granted*—*Act of 1801, ch. 6, § 59.* No more than two new trials can be granted when the trials have been had upon *the facts and merits of the case*. If more than this number have been granted, and the record is silent as to the reason therefor, the court will presume that the last was granted upon the merits and not for any special cause, excepted by judicial construction from the inhibition of the Act of 1801, ch. 6, § 59. *Ferrell vs. Alder, adm'r.*, 77.
2. *Misconduct of juror.* The defendant during a recess of the court, invited one of the jurors trying the cause to which he was a party, to take a glass of soda with him, and also to dine with him at a hotel, which the juror did, the defendant paying the charges. Nothing was said to the juror about the suit; he and the defendant were neighbors and in the habit of doing mutual favors, and, notwithstanding this, he was in favor of rendering a verdict for the plaintiff, but by consent of the parties the verdict of a majority of the jurors was taken as the verdict of the jury, they not being able otherwise to agree, and thus a verdict was rendered for the defendant. Such facts constitute no reason why the verdict should be set aside, and a new trial awarded upon the application of the plaintiff. *Vaughn vs. Dotson, adm'r., &c.*, 348.
3. *Criminal law. Prosecutor mingling with the jury.* A new trial will be awarded a prisoner convicted of manslaughter, if it appear that during the progress of the trial, the prosecutor spent a night in the room with the jury who had been committed by the court to the care of a constable; and in such case the new trial will be awarded though the prosecutor be the

NEW TRIAL—*Continued.*

sheriff of the county, and all exceptions to the competency of the panel of jurors summoned by him be waived by the prisoner; and though the prosecutor state in an affidavit that he "made use of no means of any sort to influence the jury." In such case, it is not required of the prisoner to show that in fact his rights were prejudiced by the unauthorized interference of the prosecutor; it is sufficient that, from the admitted and unexplained facts of the case, they *might have been* prejudiced. *McElrath vs. The State*, 378.

4. *Surprise.* It is no ground for a new trial that the party who has taken the deposition of a witness excepts upon the trial to so much of the deposition as is illegal evidence, though the illegal evidence proceed from the party's own witness, and be in response to a question proper in itself put to the witness by the party. In such case the other party cannot say that he was surprised by the exclusion from the jury of such illegal testimony. *Morgan vs. Winston*, 472.
See HOMICIDE, 1.

NON EST FACTUM.

See PLEADING, 1. PRACTICE, 10.

NOTICE.

See PARTITION, 1. CHANCERY, 1. MECHANICS' LIEN, 4.

NUISANCE.

Private. Chancery. The court of chancery has power to interpose in behalf of one who is injured by a continuing, permanent or recurring, private nuisance, unless the injury be such as may be compensated in damages. *Clack vs. White*, 540.

NUL TIEL RECORD.

See PRACTICE, 9.

OFFICER.

Acts of an officer de facto as they affect third persons, and as affecting himself. One who is ineligible to the office of constable, although invested with the forms of office, and although his official acts will be deemed good and valid as to third persons, in the same manner as if he were an officer *de jure*, cannot, when put on his own defense, justify under his office. *Pearce vs. Hawkins*, 87.

See INDICTMENT, 1. SHERIFF, 1, 2. DILIGENCE, 1.

PARTIES.

Chancery. How persons of color held in slavery must sue for freedom. Persons of color held in slavery can only sue for their freedom in a court of chancery by a next friend. *Doran et als. vs. Brazelton et als.*, 149.

See ESCHEATS, 2. CLERK OF CIRCUIT COURT, 1. ELECTIONS, 3. ACTION, 2. GAMING, 1. FORCIBLE ENTRY AND DETAINER, 2. AMENDMENT, 1. WITNESS, 1, 2. USE AND OCCUPATION, 1.

PARTITION.

1. *Notice. Infant. Guardian ad litem.* The notice required by the act of 1799, ch. 11, or the publication required by that of 1831, ch. 37, must be employed in all applications for the partition of lands in which infants are interested, as they cannot otherwise be properly before the court. The appearance of a guardian *ad litem*, who answers for the infants, does not make them parties and dispense with the necessity of notice or publication. *Robertson vs. Robertson et als.*, 197.
2. *Must not be partial.* The statutes relating to the partition of lands contemplate a complete and entire partition among all the heirs; hence, a partition which allots to some of the heirs their portion, and leaves the portion of other heirs undivided, is partial and unwarranted. *Ibid.*

PARTITION—*Continued.*

3. *Mode in which it should be made.* The shares of land allotted to the parties interested must be each of the same value. A partition made by the allotment of shares of unequal value, but to be equalised by the payment of money by those who have an excess of land to the others, is in conflict with the purpose of the act of 1815, ch. 123. *Ibid.*
4. *Estates in remainder.* The various statutes relating to partition do not apply to estates in remainder or reversion. *Ibid.*

PEDLAR.

Defined. A pedlar is one who travels about the country on foot or in some kind of vehicle, or in any other manner, and sells goods or small commodities by retail. *Woolman vs. The State*, 353.

PLEADING.

1. *Non est factum*—when not necessary to be pleaded on oath. If the name only of the party charged be subscribed to an account, without any acknowledgement of the correctness of the account, or his obligation to pay it, except such as might be inferred from the fact that his name appears subscribed to the account, he may show that the signature is not his act, without pleading *non est factum* upon oath. *Ross vs. Yeatman*, 144.
2. *Set-off. Replication.* To a plea of set-off, the defendant may reply both *nul tiel record* and payment. *Ridley's ex'rs. vs. Buchanan*, 555.

See ADMINISTRATOR, 1. ARREST OF JUDGMENT, 2. LOST INSTRUMENT, 1. DEVISAVIT VEL NON, 1. CHANCERY, 2. CRIMINAL LAW 3.

POOR.

Property of, exempt from execution. Certiorari and supersedeas. When property which is exempt from execution has been levied upon under an execution issued by a justice of the peace, a proper remedy for

POOR—*Continued.*

the defendant in the execution is to remove the proceeding into the circuit court by certiorari and there have the levy quashed. *Jones vs. Williams*, 105.

See WIDOW, 1.

PRACTICE.

1. *Judgment by default.* Whatever may be the length of the term of a court to which a summons is returned, it is error to render judgment by default, for want of a plea to plaintiff's declaration, within the first three days of the term. *Byrd et als. vs. Bank of Tennessee*, 43.
2. *Writ of error. Revivor. Scire facias.* If, after judgment in an inferior court, against two or more defendants, one of them die, the surviving defendants may bring a writ of error, and if the administrator of the deceased defendant wishes also to prosecute a writ of error, the proper practice is to suggest and prove the death of his intestate, and thereupon a *scire facias* will be awarded at the instance of the administrator, uniting the twofold office of a *scire facias* to revive the decree against the administrator and a *scire facias, ad audiendum errores*. *Huff & Wallen vs. Miller & Woods*, 85.
3. *Prosecution bond. Amendment. Attachment.* It is competent and proper for the chancellor, where it appears that the bond given for the prosecution of an attachment bill is defective, and the complainants ask to be permitted to amend it, to allow such amendment to be made, or such new bond to be given, as the statute requires. *Alexander & wife vs. Lisby et als.*, 107.
4. *Will, probate of.* A paper purporting to be the will of J. R., was produced and proved in common form in the county court. At a subsequent term, upon petition to be permitted to contest the will by a kinsman of the testator, the county court "set aside" the probate, and ordered that the matter of contest be

PRACTICE—*Continued.*

certified to the circuit court to be tried on an issue of *devisavit vel non*. After the issue was made up, the contestant withdrew his opposition, and the circuit court remanded the will to the county court, to be "proceeded in as in cases of uncontested wills;" whereupon, the county court ordered and adjudged that the order setting aside the probate made in the first instance, be annulled, and that the probate be reinstated. *Held* that the will not being contested in the circuit court, was properly remanded to the county court; the effect of the order of the circuit court being to revive in full force the probate, the order of the county court reinstating the probate, only stated the legal effect necessarily resulting from the action of the circuit court. *Roberts vs. Stewart et als.*, 162.

5. *Justice of the Peace. Plea in abatement.* The fact that the justice of the peace who tried a cause was incompetent because of his relationship to one of the parties, is not legitimate matter for a plea in abatement in the circuit court after the cause has been removed into court by an appeal. *Wroe & wife vs. Greer*, 172.
6. *Verdict. Witness.* When it clearly appears, during the progress of a trial, that the plaintiff has resorted to the fraudulent artifice of joining as defendant in the action one who would be an important witness for another defendant for the purpose of preventing his examination as a witness, the court may direct a verdict to be rendered for that defendant, and permit him to be introduced as a witness in behalf of the other defendant. *Beasley vs. Bradley et al.*, 180.
7. *Trial. Examination of witnesses.* The practice of examining witnesses upon the trial, separate and apart from each other, is one which is to be controlled in a very great degree, by the presiding judge, and the supreme court will not undertake to revise his practice in this respect, unless there be such a mani-

PRACTICE—*Continued.*

fest departure from a proper exercise of this discretion as might result in defeating the great object of the rule. *Nelson vs. The State*, 237.

8. *Construction of charter of Nashville & Chattanooga Rail Road Company.* The provisions of the charter of the Nashville & Chattanooga Rail Road Company, which are intended to regulate the practice of the courts, in assessing the value of land taken for the use of the road, do not authorise upon the "appeal" of either party from the report of the five commissioners, another valuation to be made, *upon a view of the premises*, by a jury of twelve persons. The jury can only make the valuation upon proof heard by them, under the direction of the court, as in all other cases. *Hord vs. Nashville & Chat'ga. R. R. Co.*, 497.
9. *Nul tiel record.* The issue upon a plea of *nul tiel record*, is triable alone by the court, upon an inspection of the record. *Ridley's ex'rs. vs. Buchanan*, 555.
10. *Non est factum. Trial.* Upon the trial of an issue upon a special plea of *non est factum*, which avers that the instrument signed by the defendant, was converted into a bill single by adding a seal to his signature, without his knowledge or consent, the proof of the issue is upon the defendant. *Brown et als.*, vs. *Phelon*, 629.

PRESUMPTION.

See GRANT, 1, 2. EVIDENCE, 9.

PRIVATE WAY.

See CHANCERY, 4. CONSTITUTIONAL LAW, 3.

PRIVY EXAMINATION.

See HUSBAND AND WIFE, 2.

PROSECUTOR.

Selling spirituous liquors to slaves. Arrest of judgment. The act of 1843, ch. 141, § 3, expressly declares that no prosecutor shall be necessary upon any indictment against a party charged with a violation

PROSECUTOR—*Continued.*

of the first and second sections of the act; and if it appear from the record that the indictment was returned into court a true bill, though there be nothing to show that the indictment was sent by the Attorney General *ex officio*, the court will, after verdict, presume the indictment was submitted to the Grand Jury in the mode contemplated by the statute. *Bedford vs. The State*, 72.

See NEW TRIAL, 3. COSTS, 4.

PURCHASER WITHOUT NOTICE.

See SALE OF PERSONAL PROPERTY, 1.

RAPE.

Can only be perpetrated by force. The offense of rape can only be perpetrated by the use of force, in overcoming the female. If the carnal knowledge of a woman be the result of a fraudulent stratagem, whereby the female is induced to yield her consent, the act is not rape. *Wyatt vs. State*, 394.

RAIL ROADS.

See CONSTITUTIONAL LAW, 2.

RECOGNISANCE.

Appearance of the party. There is no obligation imposed upon a defendant by his recognisance, beyond the simple compliance with its terms. He cannot be required to appear at a time different from that stipulated, although the Legislature should change the time of holding the court. *The State vs. Stephens*, 308.

RECORD.

See ROADS, 1. EVIDENCE, 8.

REGISTRATION.

See LIMITATION OF ACTIONS, 6.

REMAINDER.

1. *Attachment.* An estate in remainder, in real or personal estate, is *property* within the meaning of the

REMAINDER—*Continued.*

act of 1838, ch. 166, § 1, and is subject to attachment for the payment of debts. *Lockwood & Co. vs. Nye et als.*, 515.

See PARTITION, 4.

REPLEVIN.

When a proper action. Act of 1846, ch. 65. The action of replevin will lie, in all cases where the plaintiff has a present right to the possession of any personal property, in the possession of the defendant. *Shaddon vs. Knott*, 358.

See HUSBAND AND WIFE, 3.

REPLICATION.

See PLEADING, 2.

RES JUDICATA.

B. executed a mortgage of a slave to W., to secure the payment of a note for four hundred and seventy dollars, bearing interest at the rate of *ten per cent. per annum*. When the note became due, W. filed a bill in the chancery court to foreclose the mortgage. The chancellor dismissed the bill upon the ground of the illegality of the contract sought to be enforced. *Held* that this decree was no adjudication of the right of W., as mortgagee to the possession of the slave. *Hoggatt vs. White*, 265.

RETAILING LIQUORS.

License. A license issued under the act of 1846, ch. 90, is *void*, according to the positive declarations of § 3, unless the oath required to be administered to the retailer, is *endorsed thereon*. The statute is not complied with and the license made valid, by the fact that the oath was administered and recorded in the office of the clerk. *Pope vs. The State*, 611.

RETROSPECTIVE LAW.

See CONSTITUTIONAL LAW, 1.

REVENUE.

1. *Merchant. Articles manufactured in this State of imported goods.* A merchant who has imported cloth into this State, manufactured in another State or country, has paid the regular merchants' tax upon it, and made it into clothing, cannot sell the clothing in any county in the State as a pedlar without such license as is required by the revenue laws to be issued to pedlars; though he may, as a merchant, sell the clothing without additional taxation. *Woolman vs. The State*, 353.
2. *Tax list. Liability of sheriff or revenue collector.* While it is true that a sheriff or revenue collector, or the sureties of either, cannot be made liable upon their bond, because of a failure to collect taxes when no tax list has been furnished to the sheriff or collector, authenticated in the manner directed by statute; still, it is also true, that the officer and his sureties are liable for so much of the revenue as *has been collected*, whether the tax list be properly authenticated or not. *The Governor vs. Montgomery et als.*, 613.

REVIVOR.

1. *Practice.* When ten years have elapsed after the rendition of a judgment—the parties thereto having died in the mean time—in order to revive the judgment, the proper practice is, that the party representing the deceased plaintiff should make suggestion (supported by proof) of the death of the original parties, and move the court that scire facias issue to revive the judgment in the name of the original parties. *Keith and Forrest, adm'rs., vs. Metcalf, ex'r., &c.*, 74.
2. *Same. Scire facias.* If a *scire facias* which issues to revive a judgment in the name of the representatives of deceased parties, contains no recital that there was an order of court directing its issuance, it is defective, and a demurrer thereto will be sustained. *Ibid.*

See FORCIBLE ENTRY AND DETAINER, 1. PRACTICE, 2.

RETURN.

See SHERIFF, 1, 3.

RIPARIAN OWNER.

See WATERCOURSES, 3.

ROADS.

1. *Evidence. Record. County court.* Upon the trial of a prosecution for obstructing a public road, a record of the county court, which is introduced for the purpose of showing the road to be one established in pursuance of the statutes, must not only show the order appointing a jury of view, and the order establishing the road, but it must appear from the record, that there was a competent court for this purpose. *Mankin vs. The State*, 206.
2. *Overseer.* The overseer of a public road is not excused from the performance of the duties enjoined upon him by the statute, by the fact that before the expiration of the year for which he was appointed, he removes from the "bounds" of that road into the "bounds" of another. *Mitchell vs. The State*, 554.
3. *Same. Order of the court.* If the order of the county court direct that the overseer of a road shall have the "same list and bounds of hands" that were assigned to his predecessor, it is a sufficient specification of the bounds within which persons were subject to work under him. *Ibid.*
4. *Same. Waiver.* If the order appointing an overseer be irregular, and he, notwithstanding, proceeds to the performance of the duties of overseer, he thereby waives the irregularity. *Ibid.*

See TURNPIKE ROADS, 1.

SALE OF LAND.

1. *By sheriff, how vitiated.* A sale of land made by a sheriff by virtue of an execution, is not vitiated by the mere irregularity of the proceedings upon which the execution is founded; the sale is effectual to pass the title unless the proceedings are null and void. *Anderson vs. Lessee of Clark's heirs*, 156.

SALE OF LAND—*Continued.*

2. *Land descended to heirs, how subjected to sale to pay debts of the ancestor.* The acts of 1784, ch. 11, and 1822, ch. 43, which prescribe the proceedings necessary to subject real estate descended to heirs to the payment of the ancestor's debt, must be taken and construed together. *Ibid.*
3. *By decree of the chancery court. When the sale is perfected.* The sale of land by the Master, under a decree of the chancery court, is not complete until confirmation of his report of the sale. *Childress vs. Hurt*, 487.
4. *When the biddings may be opened.* Until confirmation of the report of the Master, a sale of land, made by him in obedience to a decree of the court, not being complete, it is competent for the court, upon the petition of a creditor of him whose land has been sold for the satisfaction of a debt, to open the biddings, if the sale be attended by such circumstances as satisfy the court that the property sold for a price greatly inadequate to its value, and was purchased with a view to favor the debtor, and the petitioning creditor will agree to advance upon the amount bid, such sum as may, in the estimation of the court, authorise, under the peculiar circumstances of the case, the biddings to be opened. No specific rule as to the sum to be advanced, can be adopted, as each application, must depend, in this respect, in a great measure, upon its peculiar facts. *Ibid.*
5. The title acquired by a purchaser at an execution sale, cannot be attacked upon the ground that the creditor in the judgment became the holder of the note upon which the judgment was rendered, by the assignment of the payee fraudulently, and without consideration. If the note, which is the foundation of the judgment, was executed in good faith by the maker, the sale of his land for the satisfaction of the judgment, would not be contaminated by the purpose or manner of the payee in assigning it to him

SALE OF LAND—*Continued.*

who obtains the judgment. *Dice vs. Penn et als.*, 561.

6. *Execution. Levy.* While it is the duty of the sheriff to levy an execution upon the personal property of the debtor, if any can be found; yet, if the sheriff find no personal property, but makes his levy upon the debtor's land, and afterwards sell it, the title acquired by the purchaser cannot be assailed upon the ground that the debtor had personal property upon which the execution might have been levied. *Ibid.*
7. *Vendor refusing to make title. Action.* If the vendee of land, to whom the vendor agrees in writing to sell and convey, enter into, and retain the possession of the land until the time of bringing his action, he cannot, upon the refusal of the vendor to make title, maintain an action for money had and received, against the vendor for so much of the purchase money as he has paid to him under the agreement. Such action can only be maintained when the agreement is void, or the vendee takes no benefit under it. *Hurst vs. Means*, 594.

See ESCHEATS, 2.

SALE OF PERSONAL PROPERTY.

1. *Delivery. Purchaser without notice.* A sale of personal property may be effectual to pass the title to the vendee, as against a subsequent purchaser, without notice, though the vendor be permitted by the vendee in the first instance, to retain the possession of the property. *Shaddon vs. Knott*, 358.
2. *Delivery.* A delivery of goods to a common carrier, to be by him transported to the buyer, is a delivery to the buyer, as the carrier is the agent of the buyer, and receives the goods for him. *Boyd vs. Mosely*, 661.
3. *Same. Stoppage in transitu.* When goods have been delivered by the seller to a common carrier, to be by him transported to the buyer, the property becomes vested in the buyer, subject to the seller's right of stoppage *in transitu*; but this right of the seller is

SALE OF PERSONAL PROPERTY—*Continued.*

gone if, before it is exercised, and after the delivery, other *bona fide* rights intervene; as if the buyer sell the goods or they be legally attached for debt. *Ibid.*

4. *Vendor's lien.* The lien of the seller of goods for the price thereof, does not exist after he has parted with the possession. *Ibid.*

SCIRE FACIAS.

See REVIVOR, 2. PRACTICE, 2. TURNPIKE ROADS, 1.

SET-OFF.

1. *Mutual demands.* The defendant, in an action of debt brought by an endorsee against him, upon a promissory note which has been several times endorsed, when over due, cannot set off a claim which he has against one of those through whom the note passed to the plaintiff, though he had the claim at the time the note upon which he is sued was in the hands of his debtor as an endorsee thereof. *Hooper, for the use of Given, vs. Spicer*, 494.
2. *Action by personal representative.* To an action brought by a personal representative, the defendant may, by way of set-off, avail himself of notes executed by the intestate; though assigned to the defendant by the payee after the death of the intestate; if the notes were such as would be proper matters of a set-off to an action brought by the intestate were he living. *McGinnis vs. Allen's adm'rs.*, 645.

See INSOLVENT ESTATE, 1. PLEADING, 2.

SHERIFF.

1. *When not liable for an insufficient return.* A sheriff is not liable to the plaintiff for an insufficient return, if the delinquency is attributable to a statement of facts made to the sheriff by the agent of the plaintiff. *Billingsly vs. Rankin et als.*, 82.
2. *Diligence in the execution of process.* A sheriff is required to use ordinary diligence only in the execution of process which may come into his hands; and hence, if the debtor in an execution have property,

SHERIFF—*Continued.*

and the sheriff, exercising ordinary diligence, (and this is a question of fact for the jury,) has no notice of it, he is not liable upon a return of *nulla bona*. *Barnes vs. Thompson*, 313.

3. *Liability of, for an insufficient return of an execution. Waiver.* The fact that the plaintiff in a judgment has an *alias* execution to issue, and receives a partial payment of his judgment, after the sheriff has rendered himself liable by an insufficient return of the first execution issued, is no waiver of the right to have judgment by motion against the sheriff, for the remainder of the judgment, and the damages given by the statute. *Barnes vs. White*, 442.
 4. *Bond.* In a proceeding by motion against a sheriff, upon his bond, for the insufficient return of an execution by the sheriff, it need not appear that the bond was recorded in the county court. *Ibid.*
- See EVIDENCE, 6.

SLANDER.

Evidence in mitigation of damages. Upon the trial of an action of slander to which the defendant has pleaded the general issue and justification, such evidence as may be offered in support of the plea of justification, though insufficient to support the plea, may be considered by the jury in mitigation of damages. *West vs. Walker*, 32.

SLAVES.

1. *Parol gift of life estate in a slave.* A gift by parol, by the tenant for life, of a life estate in a slave, to the remainder-man, is void as between donor and donee. *Lawrence vs. Lawrence*, 141.
2. *Adverse possession of a slave in some other person than the vendor at the time of the sale.* The sale of a slave is not vitiated by the fact, that at the time of the sale, the possession thereof is not in the vendor, but in the adverse possession of some other person. *Kimbrow vs. Hamilton, adm'r.*, 190.

SLAVES—*Continued.*

See ADVERSE POSSESSION, 1. CRIMINAL LAW, 4. PROSECUTOR, 1. PARTIES, 1. HUSBAND AND WIFE, 2, 4. VERDICT, 2.

SPECIFIC PERFORMANCE.

See EXECUTORS, 1.

SUMMARY PROCEEDING.

1. *Motion against sheriff for an insufficient return. Defence that may be made thereto.* The remedy, given by the statute, *by motion* against an officer for official delinquency, is merely a substitute for the more tedious and expensive common law remedy of an action on the case; consequently, whatever would constitute a valid defense for the officer in an action on the case, is equally available as a defense in the proceeding by motion. *Billingsly vs. Rankin et als.*, 82.
2. *A motion of clerk of the circuit court. Judgment.* The proceeding, under the statutes, against a clerk for failing to produce the proper receipts for the county and state revenue, by him collected as clerk, is summary in its character, and hence the judgment in such case, must assume, in itself, the existence of a state of facts which render it legal and proper, in view of the statutes, to remove the clerk from office. *Ragsdale vs. The State*, 416.
3. *Same. Same.* The facts which must appear in the judgment, removing a clerk for failing to produce his revenue receipts, are, that he was clerk of the court during the year or the term for which it is alleged he was in default; that it was moved before the court that he produce his receipts as directed by the statutes, and that he failed to do so. *Ibid.*
4. *Same. Appeal.* An appeal, in the nature of a writ of error cannot be taken from the judgment of the circuit court, removing the clerk of that court for failing to produce his revenue receipts, as required by the statutes, as the proceeding in such case can-

SUMMARY PROCEEDING—*Continued.*

not be considered as a *suit* and *judgment*, in the sense of the statute giving the appeal in error. *Ibid.*

5. *Same. Writ of error. Practice.* If the clerk of the circuit court be improperly removed from his office by the judgment of that court for an alleged failure to produce his revenue receipts, his remedy is, either by a *mandamus* to be restored to his office, or by writ of error, to have the proceeding revised and reversed. *Ibid.*

SUPREME COURT.

See ARREST OF JUDGMENT, 1.

SURETY.

See LIMITATION OF ACTION, 1. EVIDENCE, 6.

SURPRISE.

See NEW TRIAL, 2.

TAXES.

See REVENUE, 2.

TENANTS IN COMMON.

See USE AND OCCUPATION, 1, 2.

TRESPASS.

Adverse possession. Where parties have conveyances covering the same lands, which neither has in actual possession, if he who has the younger title enter upon the lands and cuts the timber, and with the timber so cut erects houses and fences by means whereof he becomes actually possessed of the land, the other party, having the older and better title, may maintain an action of trespass for the injuries done before the actual possession is taken. *Bailey vs. Massey*, 167.

TRIAL.

See PRACTICE, 7.

TRUSTEE.

1. *His powers limited by the terms of his appointment.* When the power and authority of a trustee are defined and limited by the terms of the trust, he can make no other disposition of the trust fund than such as is directed; and hence, if a debt which is intended to be secured by the creation of a trust fund for its payment, be in any manner extinguished, without the use of the trust fund, the trustee holds the funds subject to the order of the bargainor in the trust deed, and cannot otherwise divest himself of the title with which he is clothed, than by a surrender to the bargainor, or in the event of his death, to his properly appointed personal representative. Should the debt be extinguished after the death of the bargainor, and before the appointment of his administrator, the title to the trust fund is in *abeyance*, and cannot be levied upon by virtue of an execution issued against the bargainor, before his death, until the appointment of an administrator. *Richardson, adm'r. &c. vs. Cole et als.*, 100.
2. *Liability of, for abuse of trust by his co-trustee.* A trustee who accepts a discretionary trust, and identifies himself with it by sales and settlements, and by the reception of fees for services, cannot escape responsibility, if he permits his associate in the trust, to keep, use, or appropriate to himself, the trust fund, or a portion thereof. *McMurry, adm'r., et al. vs. Montgomery et al.*, 374.

See CONSTRUCTION OF WRITINGS, 6. CHANCERY, 3.

TURNPIKE ROADS.

Scire facias. Practice. The proper practice under the act of 1835, ch. 54, § 4, to vacate a charter granted for the construction of a turnpike road is, that the attorney general shall file in the circuit court, officially, such information as he may have respecting the abuse of the franchises or privileges granted to the proprietors of turnpike roads; and the court may thereupon, if the information be deemed sufficient to

TURNPIKE ROADS—*Continued.*

authorize such a proceeding, direct a *scire facias* (which shall issue in the name of the State, and be signed, as other process, by the clerk) to issue, calling upon the owners of the road to appear before the court, that they may show cause why the charter granted them should not be vacated. *The State vs. J. S. & W. J. Scott*, 332.

USE AND OCCUPATION.

1. *Tenants in common. Parties.* Where one of several tenants in common is in the use and occupation of land, all his co-tenants must join in an action against him to recover rent; one cannot sue alone for his interest. *Blanton vs. Vanzant*, 276.
2. *Same. Action. Assumpsit.* The action of assumpsit is the proper remedy to recover rent due from one tenant in common to his co-tenants. *Ibid.*

USURY.

See MORTGAGE, 1.

VENDOR AND VENDEE.

See WITNESS, 3.

VERDICT.

1. *Special verdict.* A special verdict must positively state the facts themselves, and the court cannot supply a defect in the statement made by the jury upon the record, by any intendment or implication whatever; and this is so, although the circumstances stated may be sufficient to warrant an inference or presumption of the existence of the matter omitted. *Jones vs. The State*, 399.
2. *Same. Tempting a slave to leave his owner.* The offense defined in the act of 1835, ch. 58, § 1, consists in the tempting or persuading a slave to leave his master's service, with the *intent* or *design* to convey the slave out of the State, or to deprive the true owner thereof. This intent or design is the chief ingredient of the offense; and hence, if the jury, in a special verdict, rendered in a prosecution for this of-

VERDICT—*Continued.*

fense, omit to state the fact that the acts of the prisoner (though they be sufficient to furnish ample *prima facie* evidence of the intent) were with this intent or design, no judgment can be rendered upon the verdict. *Ibid.*

3. *Same. Quære:* Will a special verdict in a criminal prosecution, which is so imperfect as that no judgment can be rendered upon it, be a bar to another prosecution for the same offense? *Ibid.*

WATERCOURSES.

1. *What constitutes a navigable stream.* The only change in the common law (in its classification of watercourses into streams which are navigable and which are not) effected by the adoption in Tennessee of the rule of the civil law, is the substitution of a new and more appropriate criterion of a navigable river; and that is not the flow and re-flow of the tide, but simply the fact whether the river, in the ordinary state of the water, is capable of, and suited to the usual purposes of navigation. In all other respects, the principles of the common law, regulating and defining the respective rights of the public and the riparian owners, in rivers of whatever character, remain unchanged. *Stewart vs. Clark's lessee*, 9.
2. *Same.* A river may be navigable in the ordinary acceptance of the term, and yet not navigable in a legal sense; and such is the river or stream of sufficient depth naturally for valuable *floatage*, such as *rafts*, flat-boats, and small vessels of tighter draft than ordinary. *Ibid.*
3. *Rights of the public and riparian proprietors, as affected by the navigability of a water-course.* If a watercourse be navigable in a legal sense, the soil covered by the water, as well as the use of the stream, belongs to the public. If it be navigable only in the ordinary sense, the ownership of the bed of the stream is in the riparian proprietors, and the public

WATERCOURSES—*Continued.*

have an easement therein for purposes of transportation and commercial intercourse. If the stream be so shallow as to be unfit for such purposes of transportation and commerce, both the right of property and use are wholly and absolutely in the owners of the adjoining land. *Ibid.*

WAIVER.

Levy. The levy of an execution upon the personal property of the debtor, vests the title to the property in the officer making the levy; and this title will remain in the officer, unless it appear by clear and distinct proof, that the plaintiff in the execution has waived his right to a satisfaction of his debt by a sale of the property. The mere fact that the property is levied upon in virtue of one execution, which is returned, and sold under an *alias*, does not amount to such waiver. *Evans vs. Barnes*, 292.

See SHERIFF, 3.

WIDOW.

1. *Construction of statutes exempting personal property from execution.* The Act of 1833, ch. 80, which declares that the articles exempt from execution sale in the hands of poor persons, shall also be exempt from execution in the hands of a widow of a deceased debtor, only provides that the widow shall hold the exempted articles against the execution of the creditor, and no right is conferred upon the widow except as against the creditor who seeks to levy his execution upon the property of his deceased debtor. The Act of 1842, ch. 42, § 2, forms an exception to this rule, but it is limited in its operation, to the articles specially named and exempted in the act. *Duncan, ex'r, vs. Duncan, et als*, 351.

See DOWER, 1.

WILL.

See CONSTRUCTION OF WRITINGS, 1, 2, 3, 5, 7, 8. PRACTICE, 4. DEVISE, 1.

WITNESS.

1. *Non-attendance of. Penalty. Parties.* The penalty given by statute to be recovered against witnesses who have been summoned at the instance of the accused, in a criminal prosecution, and who fail to attend, can only be recovered in the name of, and for the use of the State. *Nelson vs. Ewell et al.*, 271.
2. *Practice. Parties.* The liability incurred by a witness in default is several in its nature; the remedy to enforce it is against him alone, and it cannot be united with a proceeding against other witnesses in like default. *Ibid.*
3. *Competency. Vendor and vendee.* The vendor of a slave, who sells with a covenant of warranty as to the soundness of the slave, as well as to the title, is an incompetent witness for his vendee in a suit, involving the question of the soundness or unsoundness of the slave. *Burke vs. Clarke*, 310.
4. *Endorser. Competency.* In an action upon negotiable paper by the endorsee, against the maker, the endorser, [unless on some other account he is disqualified,] is a competent witness for either party, if he has endorsed it when over due, or if, by the laws of the State in which the paper was negotiated, the maker may, in an action against him upon the paper, resist a recovery by an endorsee, upon the ground of want of consideration, or fraud, in the making of the paper. *Smithwick & Co. vs. Anderson*, 573.
5. *Competency. Interest in the event of the suit.* The interest which renders a party incompetent as a witness must be either a legal, certain and immediate interest in the event of the cause or in the record for the reason that it will be legal evidence for or against him in another suit. A remote, uncertain or contingent interest will not disqualify, neither will a mere honorary obligation. Nor can it be left to the opinion of the witness to decide whether or not he is competent; this is a question exclusively for the

WITNESS—*Continued.*

court upon the facts of the case. *Hill vs. Miller et al.*, 659.

WRIT OF ERROR.

See PRACTICE, 2. SUMMARY PROCEEDING, 5.

See 907-7

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